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In The

Supreme Court of the United States

CRYSTAL GREGORY; ALBERTA TURNER; CARLA TURNER; TREVA GAGE; DEBRA HAMILTON; CAPRIA LEE; JEFF MCKINNEY; ARNEL MONROE; MICHAEL RICHMOND; MAREN SNELL; FELICIA TURNER; MICHAEL WARRICK; and LASHANDA WISHAM,

Petitioners,

v.

DILLARD'S, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

To set forth a claim under 42 U.S.C. § 1981 in the retail context, must a minority shopper claim and show that the retailer actively and intentionally obstructed his efforts, making the shopper's purchase impossible, or does the equal "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" provision of the statute prohibit racial harassment and race based surveillance that interferes with the making of the contract but does not actually prevent its formation?

PARTIES TO THE PROCEEDINGS

All parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Crystal Gregory, et al., respectfully request this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, entered in this case on May 12, 2009.

OPINIONS BELOW

The May 12, 2009 opinion of the United States Court of Appeals for the Eighth Circuit (App. 1-75) is published at *Gregory v. Dillard's, Inc.*, 565 F.3d 464 (8th Cir. 2009). The vacated Eighth Circuit panel decision (App. 76-140) is published at *Gregory v. Dillard's, Inc.*, 494 F.3d 694 (8th Cir. 2007). The Order granting in part and denying in part Dillard's Motion to Dismiss Plaintiffs' Third Amended Complaint and to Strike Claims, *Gregory v. Dillard's, Inc.*, No. 02-04157-CV, at 4 (W.D. Mo. Jan. 3, 2005) is unpublished. App. 141-147. The opinion of the United States District Court for the Western District of Missouri dismissing the other Petitioners' claims (App. 148-170) are published at *Gregory v. Dillard's, Inc.*, No. 02-04157-CV, 2005 WL 1719960 (W.D. Mo. 2005).

STATEMENT OF JURISDICTION

The final judgment of the Court of Appeals was entered on May 12, 2009. By order of Justice Alito dated July 30, 2009, the time for filing a petition for

certiorari was extended to September 9, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves civil rights claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981, which prohibits race discrimination in the making and enforcing of contracts. It provides, *inter alia*, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). It further provides that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

STATEMENT OF THE CASE

I. Overview

The decision of the Eighth Circuit *en banc* found that Section 1981 permits retailers to actively and intentionally obstruct African-American shoppers so long as they do not completely "thwart" the purchase by refusing to sell. App. 12-13. The majority also observed that "[r]acially biased watchfulness, however reprehensible, does not 'block' a shopper's

attempt to contract." App. 15. Judge Murphy, writing for a four-judge dissent, summarized the case differently:

> These plaintiffs have produced a voluminous factual record revealing numerous instances of humiliating and disparate treatment experienced by African American customers during their visits to Dillard's. The factual development in this case may be unique not just for the number of discriminatory incidents detailed, but also for the testimony by former Dillard's employees who described from the inside a store practice of targeting minority shoppers for enhanced suspicion, scrutiny, and harassment.[1]

App. 31. The dissent believed Petitioners had "produced issues of material fact and that their [Section] 1981 claims should not have been dismissed on summary judgment. . . ." App. 75.

II. The Shopping Incidents

This case involves systematic discrimination against African-American shoppers by Dillard's, a retail shopping chain, at its location in Columbia,

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[1] Because this case arises in the posture of motions to dismiss and motions for summary judgment, this Court is required to view all facts and draw all reasonable inferences in favor of the nonmoving party, here Ms. Gregory and the other Petitioners. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

Missouri. Dillard's discriminatory policies and practices resulted in the present action now being pursued by the thirteen Petitioners.[2] Several former Dillard's employees verified Dillard's policy and practice of targeting African-Americans. The Petitioners' complaints involved numerous, separate incidents between 1998 and 2004. All alleged race based harassment and discrimination. App. 72, 77. A brief summary of the evidence follows.

Crystal Gregory, a police officer's wife and college student, had employees hovering about while she was in the fitting room, was closely trailed by store employees during her shopping trips, and was exposed to conversations between store employees in which African-Americans were labeled as thieves. App. 21, 37, 54, 63. Alberta Turner, a daycare provider, and her children and grandchildren, were routinely followed throughout the store in a physically close and overbearing manner. App. 22-23, 38-39, 55, 64. Ms. Turner complained about the harassment and explained that the store had lost a major sale, to which an employee retorted, "So? So what?" App. 22, 39. Alberta's adult daughter, Carla, watched the incident and had similar experiences. App. 22, 38-39. Arnel Monroe, a special education teacher and high school football coach, was so humiliated by the

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[2] Originally there were seventeen plaintiffs, but during the course of these proceedings, two did not appeal the dismissal of their claims, and two withdrew after the appeal was filed. App. 5 n.4.

smothering surveillance that he left behind his intended purchase. His young daughter, confused and upset, asked, "Daddy, why is that guy staring at us?" App. 43, 86. LaShanda Wisham, Capria Lee, Felicia Turner, and Treva Gage all experienced harassing surveillance and physically close, intimidating scrutiny to the point that they left their intended purchases behind and refused to continue doing business with Dillard's. App. 38, 43, 86, 87. Michael Warrick, an attorney previously with the Missouri Commission on Human Rights, and at the time of his testimony, general counsel for the Missouri Department of Natural Resources, similarly encountered overbearing surveillance and deliberate "bumping" by store personnel. App. 43. He was so appalled by Dillard's tactics that he did not return to the store for four years. App. 43. Michael Richmond, a cosmetologist, likewise experienced close and intimidating surveillance and situations where store personnel refused to assist him with purchases. App. 44. He also left his intended purchases behind out of frustration and humiliation. App. 44. Debra Hamilton, a nurse, was followed while shopping and while at checkout counters because of her race. App. 43-44. Maren Snell, a former Dillard's employee, was also targeted for discriminatory surveillance and trailed throughout the store during off-duty shopping trips. App. 42-43. Jefferson McKinney, a UPS employee, was not permitted to test cologne samples and was denied services otherwise offered to white customers. App. 39-40.

Former Dillard's employee Theresa Cain testified that the store was especially aggressive in monitoring African-American customers and, as a result, would miss shoplifting incidents by whites. App. 8-9 n.5, 41. Former Dillard's security guard Ken Gregory, a Columbia police officer, verified that African-Americans were more strictly scrutinized and surveilled and that whites were given preferential treatment over African-Americans when caught shoplifting. App. 9 n.5, 41-42. Former Dillard's employee Rick Beasley testified that it was Dillard's practice to set higher requirements for African-American customers attempting to return merchandise. App. 9 n.5, 41. Tammy Benskin, another former Dillard's employee, testified that security code "44" was customarily announced over the store's intercom system to trigger surveillance when an African-American entered the store. App. 9 n.5, 41. She further explained that it was the store manager and his assistants who routinely subjected African-Americans to intense scrutiny and surveillance while otherwise leaving white shoppers undisturbed. App. 9 n.5, 41. Maren Snell explained management's attitude with the instruction given to her that "they are not going to buy anything anyway." App. 42.

III. Proceedings Below

In July 2002, plaintiffs Crystal Gregory, Alberta Turner, and Carla Turner filed their original complaint, alleging that Dillard's violated 42 U.S.C. § 1981 by discriminating on the basis of race in the

making and enforcement of contracts on specific occasions in 2001 and 2002.[3] The complaint was amended three times, once for the purpose of asserting allegations on behalf of a class, and later to add fourteen more individual plaintiffs, for a total of seventeen. In October 2004, the district court denied the plaintiffs' request to certify a class.

In January 2005, the district court granted Dillard's motion to dismiss the claims of eleven plaintiffs under Section 1981. App. 145. The court reasoned that "[b]ecause Section 1981 requires a *per se*[4] interference with plaintiffs' ability to contract, and because plaintiffs have failed to allege facts demonstrating a *per se* interference," the motion to dismiss should be granted. App. 145.

As to Gregory and the Turners, the court concluded that except for one claim raised by Gregory, all of the claims asserted by these plaintiffs amounted only to "discriminatory surveillance." App. 165. Citing authority that "[d]iscriminatory surveillance . . . on its own [is] not actionable under § 1981," *Hampton v. Dillard's Dep't Stores, Inc.*, 247

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[3] The complaint also alleged that Dillard's actions constituted discrimination on the basis of race in a place of public accommodation, in violation of the Missouri Human Rights Act ("MHRA"), MO. REV. STAT. § 213.065, but that issue is not presented in this petition.

[4] It is not clear what the district court meant by "*per se*" beyond the fact that race based surveillance, regardless of its nature, is not covered under Section 1981. App. 145.

F.3d 1091, 1109 (10th Cir. 2001), the court granted summary judgment for Dillard's on these claims. App. 165.

The district court also granted summary judgment in favor of Dillard's on McKinney's claim under Section 1981. Observing that McKinney did not actually attempt to purchase merchandise and that he left the store voluntarily after being subjected to what he believed to be rude and discriminatory behavior, Dillard's could not be liable under Section 1981. App. 167 (citing *Bagley v. Ameritech Corp.*, 220 F.3d 518, 521-22 (7th Cir. 2000)). The court further held that a fifteen-minute delay endured by McKinney while waiting for service from a Dillard's store clerk, which he alleged was different treatment than that afforded whites, was insufficient to sustain a Section 1981 claim. App. 167.

On appeal, a panel of the Eighth Circuit affirmed in part, reversed in part, and remanded. App. 76-140. After vacating the panel decision on September 20, 2007, the Eighth Circuit *en banc* issued an opinion on May 12, 2009. App. 1-75. The split *en banc* court affirmed the district court's dismissal of the Section 1981 claims and remanded to the district court with instructions to dismiss the state law claims without prejudice so that the claims could be decided in Missouri state court.

REASONS FOR GRANTING THE WRIT

This case raises important issues of federal law that are in need of clarification. It presents an opportunity for this Court to resolve the growing split of opinion among the circuit courts of appeal, and to eliminate the confusion that exists within individual circuit courts. This Court should also seize the opportunity to clarify the proper reach of Section 1981 in the retail context and to ensure an application consistent with Congress's intent.

I. Supreme Court Clarification Is Necessary To Resolve Inter- And Intra-Circuit Confusion

A. There Is A Distinct And Growing Split Of Opinion In The Circuit Courts Of Appeals As To Whether Only Actions That Actually Make The Formation Of A Contract Impossible Are Covered Under Section 1981

Section 1981, and its unambiguous legislative history, suggests that the law must not simply secure minority shoppers' access, but rather, that the law requires the same access as is enjoyed by other customers, regardless of race. With only minor variation, the circuits have advanced a four-part test to analyze claims under Section 1981. Those four elements are: (1) membership in a protected class, (2) discriminatory intent on the part of the defendant,

(3) engagement in a protected activity, and (4) interference with that activity by the defendant.[5] There is no dispute as to Petitioners' membership in a protected class, and while Dillard's contests whether it acted with racial animus, the Eighth Circuit has deemed satisfied for the purposes of appeal the question of whether Petitioners have established discriminatory intent. Thus, this petition will focus on the third and fourth elements. App. 8, 10.

What constitutes the same access in the retail context has led to a wide array of inter- and intra-circuit interpretations as to the application of the third and fourth prongs of the test. Several circuits, led by the Fifth and followed by the Seventh, require a plaintiff to show that the consumer was actually prevented from making a purchase. Other circuits extend the protections of Section 1981 to cover actions that interfere with, but do not necessarily block, the formation of the contract. Even Dillard's has urged the Court to resolve this issue when it petitioned the Court to review a previous Eighth Circuit decision addressing Section 1981 application in the retail context. *Green v. Dillard's, Inc.*, 483 F.3d

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[5] *See, e.g.*, *Keck v. Graham Hotel Sys., Inc.*, 566 F.3d 634, 639 (6th Cir. 2009); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 756 (7th Cir. 2005); *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004); *Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d 1091, 1101-02 (10th Cir. 2001).

533 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 1120 (2008).[6]

The Eighth Circuit requires that a shopper advancing a Section 1981 claim show "an attempt to purchase, involving a specific intent to purchase an item, and a step toward completing that purchase." App. 10. In their view, the attempt to purchase must have been "thwarted" by the retailer. App. 12. The Court explained this occurs when "a merchant 'blocks' the creation of a contractual relationship" by actually denying a sale. App. 12-13. Under the majority's view, when the retailers' actions do not actually prevent a shopper's purchase but merely deter the purchase, they are not actionable under Section 1981. App. 12-13. Confusing matters further, the *Gregory* majority relies on *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007), as an example of a "thwarted" contract. App. 12-13. However, *Green* involved a customer who successfully made a first purchase notwithstanding racial insults but subsequently abandoned a second purchase when the abuse could no longer be tolerated. *Green*, 483 F.3d at 535-36. In *Green*, the

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[6] The other issue raised by Dillard's in the *Green* petition was being held accountable for conduct of employees with no showing of corporate intent. Now, with abundant evidence of corporate intent established through direct testimony of former employees as to policy and practices, the issue of the proper standard for proving a Section 1981 retail claim is squarely presented by this case. Petition for Writ of Certiorari, *Dillard's, Inc., v. Green*, 2007 WL 2436689, at *18-24 (U.S., Aug. 23, 2007) (No. 07-260).

customer was not actually prevented from making his second purchase. *Id.* at 539. As discussed *infra* at 18-20, the standard within the Eighth Circuit is not clear; rather, the majority opinion appears to adhere to two conflicting standards – one articulated by the Fifth and Seventh Circuits, and another set forth in *Green*. App. 13-15.

The Fifth Circuit uses language comparable to the Eighth Circuit – that the contract must be "thwarted" by the retailer. *Morris v. Dillard's Dep't Store, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001). However, in application, the Fifth Circuit requires that the customer show that he was "*actually prevented, and not merely deterred* from making a purchase or receiving a service after attempting to do so." *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358-59 (5th Cir. 2003) (quoting *Morris v. Dillard's Dep't Store, Inc.*, 277 F.3d at 752) (internal quotation omitted).

The Eleventh Circuit likewise requires actual prevention of the formulation of the contract. *Kinnon v. Arcoub, Gopman & Assoc.*, 490 F.3d 886 (11th Cir. 2007). Noting that it found the *Arguello* rationale persuasive, the court ruled that consumers are required to present evidence that they were "*actually denied* the ability to make, perform, enforce, modify, or terminate a contract." *Id.* at 892 (quoting *Arguello*, 330 F.3d at 359 n.5) (emphasis added).

The Seventh Circuit seems consistent with the Fifth and Eleventh Circuits, and inconsistent with other circuits that do not require a shopper to show

he was actually prevented from making a purchase. In *Bagley v. Ameritech Corp.*, the Seventh Circuit upheld the dismissal of a case where a customer left the store without completing his purchase because an assistant store manager said she would not serve him and twice gave him the finger. 220 F.3d 518, 521 (7th Cir. 2000). The court reasoned that the manager's actions were "[nothing] more than a refusal to personally wait on Bagley," and did not reflect an official store policy. *Id.* The court ruled that a customer is required to "press on in the face of" hostile actions in order to give rise to a Section 1981 claim. *Id.* at 522 (Cudahy, J., concurring). *See also Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (concluding there was no evidence that the store denied them admittance or service).

Other circuits have articulated different standards – running the gamut from interference to actual prevention. Both the *Gregory* majority and dissent relied on the Tenth Circuit opinion in *Hampton v. Dillard's Dep't Stores, Inc.*, as authority for their opinions. 247 F.3d 1091 (10th Cir. 2001). The majority relied on *Hampton*'s statement that "there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Id.* at 1118. The dissent also relied on *Hampton*, as the decision did not require the "actual prevention" of the contract. *Id.* at 1104. That *Hampton* is cited as authority by these opposing judicial opinions exemplifies the confusion among circuits.

In *Hampton*, the plaintiff was attempting to redeem a coupon that she had received with a purchase, when a security officer accused her of shoplifting and searched her bag. *Id.* at 1099-1100. Dillard's argued that Ms. Hampton had no claim because she "was not denied a service or product." *Id.* at 1105. The court rejected Dillard's argument. The Tenth Circuit observed that it was reasonable for the jury to draw the inference that "had there been no interference, Ms. Hampton would have received the service of [her] redemption of the coupon." *Id.* at 1106. The *Hampton* court explained "that § 1981 protects the enjoyment of the benefits of a contract from *any* impairment, so long as the impairment arises from intentional discrimination." *Id.*

The Sixth Circuit has articulated still another standard that does not require actual prevention, holding that the interference with service, as opposed to an outright refusal of service, may be actionable. Within the Sixth Circuit a retailer's "markedly hostile" conduct may "give rise to a rational inference of discrimination sufficient to support a prima facie case." *Christian v. Wal-Mart Stores*, 252 F.3d 862, 871 (6th Cir. 2001) (quoting *Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694, 708 (D. Md. 2000)). To determine if conduct was "markedly hostile," the Sixth Circuit considers whether the conduct "is so profoundly contrary to the manifest financial interests of the merchant and/or her employees; so far outside of widely-accepted business norms; and so arbitrary on its face, that the conduct supports a

rational inference of discrimination." *Id.* at 872. Ultimately, the *Christian* court found that the plaintiff had a claim because she had selected merchandise for purchase, placed it in her cart, had the means to purchase it, and would have purchased it had she not been asked to leave the store. *Id.* at 878. This test was recently reaffirmed in *Keck v. Graham Hotel Systems, Inc.*, where the court held that a hotel's "complete failure to consummate a transaction as contrary to [its] financial interests and outside of widely accepted business norms" constitutes markedly hostile behavior sufficient to state a prima facie case. 566 F.3d 634, 641 (6th Cir. 2009) (quoting *Christian*, 252 F.3d at 871).

When the issue of race based surveillance is addressed directly by the courts, the confusion across and within the circuits becomes even more apparent.[7] In *Hall v. Pennsylvania State Police*, the Third Circuit was confronted with this issue and came to a conclusion directly opposite the view expressed by the Eighth Circuit here, and by the Seventh and Fifth Circuits. 570 F.2d 86 (3d Cir. 1986). The *Hall* court found that customers who alleged race based surveillance set forth a claim sufficient to survive a

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[7] This case is not about the larger issue of racial profiling for security reasons. The issue of airport security and law enforcement stops should not be equated with the surveillance exercised by Dillard's here. This case involves blatant, abusive harassment under the pretext of legitimate surveillance with a purpose to deter, humiliate and dissuade African-American shoppers from their patronage of the Dillard's facility.

motion to dismiss. *Id.* at 92. The Third Circuit explained that "Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers as is enjoyed by white citizens." *Id.* (internal quotation marks omitted). Because the customers alleged that the surveillance was based upon race, and they alleged different treatment, the court determined that they stated a Section 1981 claim. *Id.*

Regarding race based surveillance, the Tenth Circuit holds that discriminatory surveillance "on its own is not actionable under § 1981." *Hampton*, 247 F.3d at 1108. However, within the Tenth Circuit, discriminatory surveillance "can certainly be viewed as indirect evidence of discrimination." *Id.* at 1109. "'[A] § 1981 plaintiff alleging racial discrimination may prove intentional discrimination through either direct or circumstantial evidence.'" *Id.* at 1113 (quoting *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 812 (10th Cir. 2000). In *Hampton*, the plaintiff provided "multiple forms of indirect evidence of discrimination," including the testimony of Dillard's security officers on race based surveillance, similar to the evidence provided by plaintiffs here. *Id.* at 1109. According to the Tenth Circuit, this evidence, though indirect and circumstantial, was sufficient to meet the racial motivation requirement of a Section 1981 claim. *Id.*

The Sixth Circuit applies an analytical method similar to the Tenth Circuit. In *Christian v. Wal-Mart*

Stores, the court observed that evidence of discriminatory surveillance could reasonably lead a jury to find that a retail employee acted with discriminatory intent. 252 F.3d 862, 874-75 (6th Cir. 2001). While the court did not explicitly cite to *Hampton*, the use of discriminatory surveillance to show discriminatory intent appears consistent with the Tenth Circuit's holding.

The First Circuit falls somewhere between the position of the Eighth Circuit and Tenth Circuit, where race based surveillance, "however reprehensible," does not set forth a Section 1981 claim; and the Third Circuit, where race based surveillance, combined with an allegation of disparate treatment, sets forth a Section 1981 claim. App. 14-15. Another case relied upon by both the majority and dissenting opinions, *Garrett v. Tandy Corp.*, noted that "[u]nadorned" surveillance does not set forth a Section 1981 claim "[s]o long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases." 295 F.3d 94, 101 (1st Cir. 2002). The *Garrett* court went on to explain the limitations on its interpretation: "[T]he challenged surveillance must have some negative effect on the shopper's ability to contract with the store in order to engage the gears of section 1981." *Id.* The First Circuit clearly rejects the view that race based surveillance can never state a claim, but appears to require more than just an allegation of disparate treatment.

Without a uniform standard, the right to be free from racial discrimination under Section 1981 differs based on the location of the retail establishment. In the Fifth, Seventh, and Eleventh Circuits, a shopper must show that a contract was actually prevented by the defendant's action. On the contrary, a shopper in the Tenth, Sixth, Third, or First Circuit need not show actual prevention, but rather the interference with, or deprivation of, a contractual right. Meanwhile, as discussed *infra*, the Eighth Circuit appears to adopt both views. This Court should grant review and clarify a standard applicable to the nation.

B. The Lack Of Clarification From The Court Has Led To Conflicting And Confusing Standards Within The Eighth Circuit.

The majority opinion, the four-judge dissent, the partial concurrence and partial dissent, and the vacated panel decision exemplify the Eighth Circuit's confusion because the courts lack guidance from this Court on these important and recurring issues. While the majority and the dissent in *Gregory* agreed that there must be interference with a contractual interest to give rise to an action under Section 1981, they fundamentally disagreed on the proper standard for determining what constitutes interference. As discussed *supra*, the majority required that the retailer's action prevent or thwart the creation of a contract. App. 12-13. The dissent took the opposite view:

> To hold that a retail store may engage in intentional practices designed to hinder or burden an African American's attempts to make and enforce contracts fundamentally misapprehends Congress's intentions in enacting § 1981. It is not enough that merchants grudgingly afford African Americans *some* access to their goods and services. By § 1981's plain terms and its unambiguous history, merchants must offer the *same* access as is enjoyed by all other customers, regardless of race.

App. 35. (Murphy, J., dissenting) (emphasis added).

The confusion within the Eighth Circuit is made clear by the conflicting decisions in *Green* and *Gregory*, which both stand as good law. App. 57-58. The *Gregory* majority mischaracterized the holding in *Green*, (App. 13), where the court based its ruling on the egregiousness of an employee's actions and concluded that it was possible for a jury to reasonably find that one employee's rude behavior could thwart a shopper's ability to contract, even when another employee offered the shopper assistance. *Green*, 483 F.3d at 539. The court based its holding on the nature of the salesperson's conduct, finding that it went beyond "bad manners, isolated rudeness, or neglect of a customer." *Id.* Instead of requiring an actual deprivation of the ability to contract, the *Green* test makes actionable a racially hostile shopping atmosphere that causes shoppers to abandon their purchases. *Id.* at 540; App. 13. (Murphy, J. dissenting). The *Gregory* majority and *Green* decision

cannot be reconciled. App. 57. (Murphy, J. dissenting) (emphasizing that although the majority cites *Green* for support, the decision "flatly precludes" the application of the majority's test).

Within the Eighth Circuit, there are two standards for proving actionable interference. Under one, the retailer's conduct must rise to active refusal of service, or must thwart a shopper's ability to contract. Under the other, a plaintiff states a Section 1981 claim when a retailer creates a racially hostile shopping atmosphere that causes him to abandon his purchase. Without this Court's guidance in clarifying an appropriate standard, inter- and intra-circuit will continue.

II. Supreme Court Clarification Is Necessary To Provide Guidance For The Implementation Of The Safeguards Provided By Section 1981

Section 1981 of the Civil Rights Act protects an individual's right to contract without racial discrimination. The plain meaning of this statute incorporates all phases and incidents of the contractual relationship. This includes an individual's opportunity to enter into a contractual relationship, as well as the normative conduct that customarily leads to contract formation, *such as inspection of goods, comparison of goods and prices, inquiry as to terms and conditions, and negotiations.* The plain meaning of the statute extends beyond the mere

exchange of consideration and applies to other aspects of the contract relationship.

Congress clarified the plain meaning of Section 1981 with the 1991 Amendments to the Civil Rights Act. The 1991 Amendments added a new subsection to Section 1981, which expansively defines the phrase "to make and enforce" contracts. 42 U.S.C. § 1981. Section 1981(b) states, "[f]or the purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The additional language solidified Congress's intentions that Section 1981 was to be a comprehensive statute prohibiting any type of racial discrimination affecting any phase of the contractual relationship. The 1991 Amendments were enacted to restore the broad scope of Section 1981 and to specifically overrule the Supreme Court's narrow interpretation of the statute's meaning. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Congress immediately responded to the *Patterson* decision with an amendment which clarified the statute's purpose and scope – to prohibit discrimination in all aspects of a contractual relationship. Congress clarified that Section 1981 prohibits discrimination in "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

The 1991 Amendments eliminated any doubt as to the reach of Section 1981 – to ensure that federal law prohibits all race discrimination in all phases of the contractual relationship. Judge Colloton recognized that "[w]hether and how federal law should regulate particular activity that is considered morally or socially unacceptable is a policy judgment made by Congress and the President." App. 26. However, he then added, "We make no judgment about the wisdom of any policy option, but we conclude that § 1981 as presently drawn does not regulate the retail shopping environment to the extent urged by the plaintiffs in this case." App. 27. Judge Murphy's dissent concluded otherwise: "The majority turns the settled intent of Congress on its head by holding that intentional discrimination which is demeaning or humiliating is nevertheless tolerable under § 1981 even if it thwarts the exercise of protected rights. This cannot be reconciled with the statute's plain instruction. . . ." App. 74.

The Court should review this case and clarify the scope of this civil rights statute.

III. A National Standard Is Needed To Ensure Consistent Application Of The Law And To Guide Businesses In Designing Lawful Policies

Widely varying legal standards for assigning liability under Section 1981 have resulted in similarly situated parties receiving different treatment in

different courts. Under the majority's misapplication of Section 1981, the *Gregory* plaintiffs were denied the opportunity to present their case to a jury, despite the court's acknowledgement that Dillard's acted with discriminatory intent. There is sufficient evidence that Dillard's had an established custom and practice of singling out African-American shoppers for inferior treatment and discrimination. Store employees routinely subjected black customers to intense scrutiny and surveillance, while allowing white patrons to browse the store undisturbed. App. 41. If the court had applied a different interpretation of Section 1981, such as the Sixth Circuit's "markedly hostile" standard, it would have denied Dillard's motion for summary judgment and allowed the case to go to trial. Likewise, in the Third Circuit, the *Gregory* plaintiffs would have had the opportunity to convince a jury that their rights under Section 1981 had been violated.

Similarly situated parties must be able to vindicate their federally guaranteed rights in the same manner across courts. There is a well defined circuit split on what actions constitute interference when forming a retail purchase agreement, which then determines when a consumer may bring a claim under Section 1981. That split has created confusion and inconsistency in the application of this federal law.

Further, the existence of multiple standards, especially within a circuit, prompts confusion not only in the courts but also for retailers seeking to design policies to combat retail theft, while, at the same

time, doing so in a manner that does not discriminate based upon race. Today, Dillard's, a national company with stores in many states, has no uniform guiding principle to help it design racially-neutral practices and procedures. What is considered consistent with Section 1981 in one jurisdiction may violate the statute in another.

Consumers also need this important clarification so that they may understand their basic rights. As discussed *supra*, a customer in Kentucky or Kansas who experiences racial discrimination in a retail setting is more likely to withstand a motion for summary judgment than a customer who has an identical experience in Missouri. The fact that several federal circuit courts of appeal apply inconsistent standards within their own borders emphasizes the need for Supreme Court resolution.

IV. Racial Discrimination In The Retail Context Is A Significant And Continuous Problem That Warrants Attention By This Court

That Congress intended that people of all races have an opportunity to enter into contracts is not in dispute. *See generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (explaining the legislative history and Congress's intent for the Civil Rights Act of 1866). *See also Patterson*, 491 U.S. at 172 (reaffirming that "§ 1981 prohibits racial discrimination in the making and enforcement of private contracts.");

Runyon v. McCrary, 427 U.S. 160, 168 (1976) (declaring that "it is now well established that [Section 1981], prohibits racial discrimination in the making and enforcement of private contracts").

Furthermore, the disparate shopping and dining experiences of people of color have been well-documented by contemporary television news organizations, such as ABC and CNN, which have reported the harassment and animus associated with being a consumer of color in the United States. ABC News has exposed the persistence of racism in our culture, specifically in the marketplace, through the use of hidden cameras.[8] Consumers confronted with blatant racial profiling and discrimination in a popular retail store either accepted or ignored it, allowing the store to continue discriminating against innocent shoppers. CNN, in its "Behind the Scenes" series, used individuals' stories to illustrate a similar example of racial discrimination.[9]

These experiences are not just fodder for cultural debate but have been analyzed in many of our nation's academic journals. A recent survey on consumer discrimination revealed that forty-three percent of those surveyed reported that they had

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[8] Anna Norman, *'Shopping While Black': Would You Stop Racism?*, March 23, 2009, *available at* http://abcnews.go.com/WhatWouldYouDo/Story?id=7131333&page=4Anne\.

[9] Soledad O'Brien, *Behind the Scenes: Black and Shopping in America*, July 24, 2008, *available at* http://www.cnn.com/2008/US/07/23/btsc.obrien/index.html.

experiences of being treated differently while shopping because of their race, with eighty-two percent of those individuals admitting that they never reported the experience to anyone and fifty percent still making purchases.[10] These academic studies bolster the perception of some consumers of color that they are being treated differently.[11] Additionally, there are many legal articles discussing the unequal application of the protections afforded by Section 1981 and the different types of legal protections provided by the courts in the retail context.[12]

Unfortunately, the experiences of Petitioners are not isolated examples of racial discrimination in retail establishments. The treatment they received

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[10] Teresa F. Lindeman, Study Finds Racial Profiling of Shoppers is Real, but it Goes Unreported, PITTSBURGH POST-GAZETTE, Oct. 10, 2007, at A7, *available at* http://www.post-gazette.com/pg/07283/824141-28.stm.

[11] *See, e.g.*, Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

[12] *See, e.g.*, Abby Morrow Richardson, Note, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM, 119 (2005); Simone P. Wilson, *Retailing Racial Profiling: A Case for the Use of the Full and Equal Benefits Clause of Section 1981 in Consumer Racism Claims*, 6 RUTGERS RACE & L. REV., 123 (2004); Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003); Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159 (2001); Deseriee Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001).

illustrates that racial minorities still battle disrespect, racial slurs, and suspicion in the marketplace. African-American shoppers routinely experience race based harassment throughout the United States. Although a federal statute exists to prohibit discriminatory treatment in consumer retail settings, circuits still differ on the boundaries of protection for communities of color.

Our courts have taken great strides toward establishing equality in our workplaces, schools, military, government, and athletic organizations. However, people's ability to purchase goods – to satisfy basic needs – is still frustrated by racial discrimination. The direct evidence of race based harassment and surveillance in this case provides this Court an excellent opportunity to delineate the proper reach of Section 1981 in a retail setting. Petitioners' varied shopping experiences will allow this Court to clarify the applicable standard when courts are confronted with claims of racial discrimination in the retail context.

CONCLUSION

This Court should grant Petitioners' writ of certiorari so as to provide a consistent application of Section 1981 by resolving the split in the circuits, but also to speak on this issue which affects the day-to-day lives of millions of Americans.

For the above reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted this 9th day of September, 2009.

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Crystal Gregory; Alberta Turner; Carla Turner; Treva Gage; Debra Hamilton; Capria Lee; Antwinette Avery; Jeff McKinney; Arnel Monroe; Michael Richmond; Maren Snell; Felicia Turner; Michael Warrick; LaShanda Wisham; Cecilia Young, Appellants, v. Dillard's, Inc., Appellee.

No. 05-3910.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

565 F.3d 464; 2009 U.S. App. LEXIS 10101

April 16, 2008, Submitted
May 12, 2009, Filed

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JUDGES: Before LOKEN, Chief Judge, WOLLMAN, MURPHY, BYE, RILEY, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON, and SHEPHERD, Circuit Judges. BENTON, Circuit Judge, concurring in part and dissenting in part. MURPHY, Circuit Judge, with whom BYE, MELLOY, and SMITH, Circuit Judges, join, dissenting.

OPINION BY: COLLOTON.

OPINION

Thirteen African-Americans appeal the decisions of the district court[1] dismissing their claims against Dillard's, Inc., based on alleged race discrimination at the Dillard's department store in Columbia, Missouri. We affirm the district court's dismissal of the plaintiffs' claims under 42 U.S.C. § 1981, and remand with directions to modify the final judgment so as to dismiss the plaintiffs' claims under the Missouri Human Rights Act without prejudice.

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

I.

In July 2002, plaintiffs Crystal Gregory, Alberta Turner, and Carla Turner filed their original complaint, alleging that Dillard's violated 42 U.S.C. § 1981 by discriminating on the basis of race in the making and enforcement of contracts on specific occasions in 2001 and 2002. The complaint alleged that Dillard's actions also constituted discrimination on the basis of race in a place of public accommodation, in violation of the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.065. The complaint was amended three times, once for the purpose of asserting allegations on behalf of a class, and later to add fourteen more individual plaintiffs, for a total of seventeen.[2] In October 2004, the district court denied the plaintiffs' request to certify a class pursuant to Federal Rule of Civil Procedure 23.[3]

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[2] The fourteen new plaintiffs were Treva Gage, Debra Hamilton, Capria Lee, Antwinette Avery, Jeff McKinney, Arnel Monroe, Michael Richmond, Maren Snell, Felicia Turner, Michael Warrick, LaShanda Wisham, Cecilia Young, Michael Butler, and Deidre Golphin. Butler and Golphin did not appeal, and Avery and Young withdrew from the appeal after it was filed, thus leaving a total of thirteen appellants.

[3] The third amended complaint sought to assert class-wide claims in three areas, described by the district court as "(1) surveillance/hostile shopping environment, (2) returns and exchanges, and (3) check-writing." As to the first area, the court concluded that none of the named plaintiffs had been "denied" an opportunity to make purchases at Dillard's, and that whether particular plaintiffs had been "deterred" or "discouraged" from making a purchase required individualized fact-finding that

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In January 2005, the district court granted Dillard's motion to dismiss the claims of eleven plaintiffs under § 1981. The court observed that these plaintiffs "tersely allege" that they "have each experienced, within the time period of 1998 to the present, instances at Dillard's Columbia, Missouri, store in which they were followed and/or otherwise subjected to surveillance based upon their race." Order, R. Doc. 159, at 2. Relying on *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002), where the court held that "[s]o long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases, it is not actionable under section 1981," *id.* at 101, the district court ruled that the failure of the eleven plaintiffs to allege "that they were questioned, searched, detained, or subjected to any physical activity other than being followed or subjected to surveillance" was fatal to their claims. Order, R. Doc. 159, at 3-4. The court reasoned that "[b]ecause Section 1981 requires a *per se* interference with plaintiffs' ability to contract, and because

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made class certification improper. With respect to claims pertaining to returns and exchanges, the court determined that there was "no evidence" that any discriminatory actions of Dillard's employees was "the result of an official or de facto company policy," and that the proposed class thus failed the commonality requirement of Rule 23(a)(2). As to claims pertaining to check-writing, the court determined that only one plaintiff asserted a check-writing claim, and that this claim was "borderline-frivolous." The court thus found insufficient evidence that the plaintiffs could satisfy the numerosity requirement of Rule 23(a)(1).

plaintiffs have failed to allege facts demonstrating a *per se* interference," the motion to dismiss should be granted. *Id.*

In July 2005, the district court considered motions for summary judgment with respect to the remaining plaintiffs, including Gregory, the Turners, and Jeff McKinney.[4] As to Gregory and the Turners, the court concluded that except for one claim raised by Gregory, all of the claims asserted by these plaintiffs amounted to "discriminatory surveillance." *Gregory v. Dillard's, Inc.*, No. 02-04157, 2005 WL 1719960, at *8 (W.D. Mo. July 22, 2005). Citing authority that "[d]iscriminatory surveillance . . . on its own [is] not actionable under § 1981," *Hampton v. Dillard's, Inc.*, 247 F.3d 1091, 1109 (10th Cir. 2001), the court granted summary judgment for Dillard's on these claims. The district court opined that "[a]llowing the Turners and Gregory to proceed on a theory of discriminatory surveillance 'would come close to nullifying the contract requirement of Section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts.'" *Gregory*, 2005 WL 1719960, at *8 (quoting

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[4] The court also considered and dismissed a claim brought by Cecilia Young, who has withdrawn her appeal. Another plaintiff, Deirdre Golphin, voluntarily withdrew her claims, and they were dismissed with prejudice on stipulation of the parties. The district court denied Dillard's motion for summary judgment as to the claim of Michael Butler. Butler and Dillard's later reached a settlement, and Butler's claim was dismissed with prejudice.

Lewis v. J.C. Penney Co., 948 F. Supp. 367, 371-72 (D. Del. 1996)). On Gregory's remaining claim that a Dillard's employee once refused to let Gregory walk through the store while carrying a bedding set that she had purchased on an earlier date, the court concluded that Gregory presented no evidence that she intended or attempted to purchase merchandise on the day of the incident, and that she therefore failed to demonstrate an interference with an actual contractual interest or relationship.

The district court granted summary judgment in favor of Dillard's on McKinney's claim under § 1981. Observing that McKinney made no attempt to purchase merchandise, and that he left the store voluntarily after being subjected to what he believed to be rude behavior, the court ruled that because McKinney chose to leave the store of his own accord, Dillard's could not be liable under § 1981. *Gregory*, 2005 WL 1719960, at *8 (citing *Bagley v. Ameritech Corp.*, 220 F.3d 518, 521-22 (7th Cir. 2000)). The court further held that a 15-minute delay endured by McKinney while waiting for service from a Dillard's store clerk was insufficient to sustain a § 1981 claim.

As to the state-law claims under the MHRA, the district court observed that the Missouri statute prohibits discrimination on the basis of race in "any place of public accommodation." Mo. Rev. Stat. § 213.065. After analyzing the statutory definition of "places of public accommodation," *id.* § 213.010(15), the district court concluded that the phrase does not include retail establishments. On that basis, the court

dismissed the plaintiffs' claims against Dillard's under the MHRA.

II.

We first consider the claims arising under federal law. Section 1981 provides that all persons within the jurisdiction of the United States shall have "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). First enacted in 1866, the statute was amended in 1991 to define "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b).

While § 1981 prohibits racial discrimination in "all phases and incidents" of a contractual relationship, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), the statute "does not provide a general cause of action for race discrimination." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001). Rather, the 1991 amendments retained the statute's focus on contractual obligations. *Id.* Congress "positively reinforced that element by including in the new § 1981(b) reference to a '*contractual relationship.*'" *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006) (emphasis in original). "Any claim brought under § 1981, therefore, must initially identify an impaired 'contractual

relationship' under which the plaintiff has rights." *Id.* at 476; *accord Youngblood,* 266 F.3d at 855. Section 1981 is not, however, limited to existing contractual relationships. The statute "protects the would-be contractor along with those who already have made contracts," *Domino's Pizza,* 546 U.S. at 476, and it thus applies to discrimination that "blocks the creation of a contractual relationship" that does not yet exist. *Id.*; *see Runyon v. McCrary,* 427 U.S. 160, 172, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976).

Our court has identified several elements to a claim under § 1981, which we divide into four parts for analysis: (1) membership in a protected class, (2) discriminatory intent on the part of the defendant, (3) engagement in a protected activity, and (4) interference with that activity by the defendant. *See Green v. Dillard's, Inc.,* 483 F.3d 533, 538 (8th Cir. 2007); *Bediako v. Stein Mart, Inc.,* 354 F.3d 835, 839 (8th Cir. 2004). The disputed issues in this appeal are elements (3) and (4). There is no dispute that the plaintiffs are members of a protected class, and while Dillard's disputes that it acted with any racial animus, it does not urge dismissal of the claims on the ground that the plaintiffs failed to allege or present a disputed issue of fact concerning discriminatory intent.[5] We focus, therefore, on whether each

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[5] In connection with the motion for summary judgment, the plaintiffs presented evidence from several witnesses to support their allegation that Dillard's acted with discriminatory intent. Theresa Cain, a Dillard's employee from September 1999 to

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October 2000, averred in an affidavit that "other Dillard's employees often stereotyped African American customers as likely shoplifters," that she "regularly observed security officers and sales clerks watching and/or following African-American customers for no reason except that the customers were African American," and that "Dillard's security officers so focused their surveillance on African American customers to the exclusion of Caucasian customers that on numerous occasions [she] observed Caucasian customers openly shoplift items without being noticed by store security." Appellants' App. 163. Maren Snell, who worked at the store in 2001, testified that she saw store employees ask for receipts from black customers seeking to return merchandise, but that white customers were not asked for receipts. *Id.* at 187. Tammy Benskin, an employee from 1997 to 1998, testified that the store's security code – directing staff to be "on the lookout" – was announced over the employee intercom "ninety percent more" when African Americans entered the store than when non-African Americans entered. Benskin saw the store manager follow African Americans around the store, but could not recall seeing him follow non-African Americans. *Id.* at 131-33. Kenneth Gregory, husband of a plaintiff, worked at Dillard's as a security guard during 1995, 1997, and 1998. Gregory testified that he once followed a white man in the store on suspicion that he intended to shoplift a hat, but the store manager stopped and questioned the man before he exited the store, and the man left without the hat. Gregory concluded that the manager would not have stopped a similarly-situated black person, but would have allowed him to leave the store and face arrest. *Id.* at 141-43. Another former employee, Roderick Beasley, testified that he witnessed what he believed was discrimination when he worked at the store from 1996 to 1999. Beasley identified two employees, saying that he "wouldn't call them racists," but that "maybe they had tendencies to watch folks that should not [sic]." *Id.* at 153. Beasley said that the employee behavior was "systematic," and "if it's not brought to [the store manager's] attention with credible evidence, he can't do anything about it." *Id.* at 155. For a record-based discussion of other facts recounted by the principal dissent, *post,* at 30-32, *see Gregory v. Dillard's, Inc.*, 494 F.3d 694, 714 n.7, 722 n.8 (8th

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plaintiff engaged in protected activity and whether Dillard's interfered with such activity.[6]

To show protected activity, the third element, a plaintiff alleging interference with the creation of a contractual relationship in the retail context must demonstrate that he or she "actively sought to enter into a contract with the retailer," and made a "tangible attempt to contract." *Green,* 483 F.3d at 538 (quoting *Morris v. Dillard Dep't Stores, Inc.,* 277 F.3d 743, 752 (5th Cir. 2001)). In view of the statute's focus on protecting a contractual relationship, a shopper advancing a claim under § 1981 must show an attempt to purchase, involving a specific intent to purchase an item, and a step toward completing that purchase. *See Green,* 483 F.3d at 538 (holding that

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Cir. 2007) (dissenting opinion), *vacated and reh'g en banc granted.*

[6] At oral argument, plaintiffs suggested that each plaintiff need not satisfy each element of a § 1981 claim, and that the court should "lump them together" when analyzing the sufficiency of the evidence presented. We reject the notion that Dillard's may be liable under § 1981 based on a hypothetical composite plaintiff even if it did not unlawfully interfere with the right of any individual to make or enforce a contract. Indeed, the district court refused to certify a class action in this case precisely because the claims of the various plaintiffs required individual fact-finding on the interference element of § 1981, and the plaintiffs have not appealed that ruling. *Cf. Broussard v. Meineke Disc. Muffler Shops, Inc.,* 155 F.3d 331, 345 (4th Cir. 1998) ("[C]ourts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be.").

shopper satisfied third element by selecting a specific item in display case and communicating to sales clerk her desire to purchase that item); *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 435 (4th Cir. 2006) (holding that plaintiffs who had purchased and received a gift package entitling the recipient to a variety of salon services had demonstrated a contractual relationship); *Williams v. Staples, Inc.*, 372 F.3d 662, 668 (4th Cir. 2004) (holding that the plaintiff sought to enter a contractual relationship when he offered payment by check); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 874 (6th Cir. 2001) (holding that a plaintiff who had selected merchandise for purchase by placing it in her cart, had the means to purchase, and would have purchased the merchandise had she not been asked to leave the store had shown a sufficient contractual relationship to bring a § 1981 claim); *cf. McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1348 (11th Cir. 1986) (holding that when a customer lifts an item from a shelf or rack to determine its price, there is no contractual relationship with the seller).

To the extent that the plaintiffs urge us to expand our interpretation of the statute beyond the elements stated in *Green*, and to declare that a shopper need only enter a retail establishment to engage in protected activity under § 1981, we decline to do so. The Tenth Circuit in *Hampton* addressed a comparable contention that § 1981 "protects customers from harassment upon entering a retail establishment." 247 F.3d at 1118. Stating that it could not

"extend § 1981 beyond the contours of a contract," the *Hampton* court rejected the claim of a plaintiff who failed "to make or attempt to make a purchase" at a department store. *Id.* In reaching this conclusion, the court found itself "aligned with all the courts that have addressed the issue" in requiring that "there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Id.* (citing *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192, 1201 (D. Kan. 1999); *Sterling v. Kazmierczak*, 983 F. Supp. 1186, 1192 (N.D. Ill. 1997); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371 (D. Del. 1996)); *see also Morris v. Office Max, Inc.*, 89 F.3d 411, 413-15 (7th Cir. 1996) (upholding dismissal of a claim brought by two shoppers who were examining time stamps and discussing the advantages and disadvantages of three or four models when they were approached by police, because interference with "prospective contractual relations" was insufficient to state a claim under § 1982, which is "construed in tandem" with § 1981). We agree with this analysis.

To demonstrate unlawful interference by a merchant under § 1981, the fourth element, a plaintiff must show that the retailer "thwarted" the shopper's attempt to make a contract. *Green*, 483 F.3d at 539. By "thwart," we mean that interference is established where a merchant "blocks" the creation of a contractual relationship. *Domino's Pizza*, 546 U.S. at 476. This element is satisfied, for example, where a retailer asks a customer to leave a retail establishment

in order to prevent the customer from making a purchase. *Christian,* 252 F.3d at 873. In *Green,* our court held that where a sales clerk "explicitly refused service" to two shoppers based on race, "treated them at all times with pronounced hostility," "discouraged her coworker from assisting them by questioning their ability to pay," directed "a most egregious racial slur" and "forceful racial insult" at the shoppers,[7] and "actively hindered" the efforts of another sales clerk to serve the customers, the plaintiffs had shown conduct sufficiently severe to constitute actionable interference. 483 F.3d at 539.

Several courts have concluded, however, that not all conduct of a merchant that offends a customer is sufficient to constitute actionable interference with a contractual relationship for purposes of § 1981. The Fifth Circuit, for example, has held that where a shopper abandoned his purchase due to a merchant's mistreatment of the shopper's daughter, the merchant did not "actually interfere" with or "thwart" an attempted purchase in a manner that violated § 1981. *Arguello v. Conoco, Inc.,* 330 F.3d 355, 358-59 (5th Cir. 2003). In that circuit, "a § 1981 claim must allege that the plaintiff was *actually prevented, and not merely deterred,* from making a purchase or receiving

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[7] After one of the customers in *Green* presented his identification and credit cards, identified himself as a police officer, and expressed desire to make a purchase, the sales clerk "stepped back and said, 'Fucking niggers' and stalked off." 483 F.3d at 535.

a service after attempting to do so." *Id.* (emphasis in original) (internal quotations omitted); *accord Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d at 752-53; *see Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 U.S. Dist. LEXIS 15796, 1996 WL 617165, at *3-4 (N.D. Ill. Oct. 23, 1996).

The Seventh Circuit similarly has held that where a shopper opts not to contract with a merchant because the shopper is offended by certain racially motivated activity of an employee of the store, there is no claim under § 1981. In *Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000), a customer left a store after he was offended by the behavior of an assistant sales manager, who said she "would not serve" the customer and "gave him the finger." *Id.* at 520. The court held that while it could not fault the customer for taking offense, this offensive conduct was insufficient to state a claim under § 1981, because the merchant was "not responsible for terminating the transaction." *Id.* at 522.

In particular, we agree with two other circuits that discriminatory surveillance by a retailer is insufficient to establish interference with protected activity under § 1981. The First Circuit, observing that "[i]n a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movement," held that an allegation of discriminatory surveillance is insufficient to state a claim under § 1981. *See Garrett*, 295 F.3d at 101. The Tenth Circuit reached the same conclusion, stating that "discriminatory surveillance"

is "not actionable under § 1981." *Hampton*, 247 F.3d at 1108. Racially biased watchfulness, however reprehensible, does not "block" a shopper's attempt to contract.[8]

Judge Murphy's dissent, by contrast, advocates an expansive interpretation of § 1981 that acknowledges no limiting principle on actionable interference in the retail shopping context, such that virtually any case in which there is a disputed issue regarding the merchant's motivation would be submitted to a jury. Indeed, the dissent's rationale does not exclude the

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[8] In opposition to *Garrett* and *Hampton*, Judge Murphy's dissent relies on a thirty-one year-old decision of the Third Circuit in *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978). The court in *Hall* held that a § 1981 claim withstood a motion to dismiss where the plaintiff alleged that the State of Pennsylvania, with the cooperation of a bank, initiated a program to photograph "suspicious-looking blacks" who entered the bank, and to preserve the photographs for unlawful purposes. *Id.* at 88. The Third Circuit reasoned that the allegations set out a cognizable claim against the bank under § 1981, because the plaintiff's "photograph was taken for the police by bank employees pursuant to a racially based surveillance scheme," and the bank allegedly had adopted a policy "to offer its services under different terms dependent on race." *Id.* at 92. The court framed the issue as one involving "contractual customers," *id.*, and it thus appears that the plaintiff already had a contractual relationship with the bank before he entered to transact business and was photographed. The court did not hold that the alleged photography program blocked the creation of a contractual relationship, *see Domino's Pizza*, 546 U.S. at 476, such that it interfered with the plaintiff's equal right to make contracts. We find the brief discussion in *Hall* inapposite to the claims of retail shoppers in this case.

possibility that even surveillance unknown to a shopper constitutes actionable interference. *Post,* at 491 n.18. This approach not only conflicts with the decisions of several circuits, but it is inconsistent with the dissent's own purported adherence to the standard established in *Green.*

III.

A.

Turning to the specific claims at issue in this appeal, the district court resolved nine of them on a motion to dismiss, holding that an allegation of discriminatory surveillance alone was insufficient to state a claim under § 1981. We review the district court's decision *de novo. Carter v. Arkansas,* 392 F.3d 965, 968 (8th Cir. 2004).

The complaint in this case involved seventeen plaintiffs, thirteen of whom have appealed. In the complaint, each plaintiff made a summary allegation that he or she had "sought to make and enforce a contract for services ordinarily provided by Dillard's," and had been "deprived of services" while similarly-situated white persons were not, or had received services "in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." Appellants' App. 50-85. To explain the grounds on which their claims rested, plaintiffs Crystal Gregory, Alberta Turner, and Carla Turner included factual allegations concerning their shopping experiences at Dillard's, and alleged that

employees of Dillard's had taken certain actions based on race in those instances that gave rise to liability under § 1981. In sharp contrast to Gregory and the Turners, the nine appellants considered on the motion to dismiss alleged in their factual section of the complaint only that "each experienced . . . instances at Dillard's Columbia, Missouri store in which they were followed and/or otherwise subjected to surveillance based upon their race." Appellants' App. 50.[9]

Even before the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), we held that a civil rights complaint "must contain facts which state

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[9] The section of the complaint on "jurisdiction and venue" alleged that the plaintiffs had been "deterred from making shopping purchases, impaired in their ability to make shopping purchases, and/or deprived of services enjoyed by non-minorities because of defendant's racial profiling, following, harassing, and engaging in other acts designed to directly or indirectly refuse or withhold services from African American customers who enter Dillard's." Appellants' App. 33. Because this section refers to all plaintiffs and uses the "and/or" formulation, it does not connect any particular plaintiff to any particular allegation. A section of the complaint asserting "class action allegations" similarly uses "and/or" within a series of allegations and refers to "one or more" actions taken by Dillard's without specifying which action or actions allegedly apply to which plaintiff or plaintiffs. *See generally Ollilo v. Clatskanie Peoples' Util. Dist.*, 170 Ore. 173, 132 P.2d 416, 419 (Or. 1942) (observing that the use of "and/or" "generally tends toward confusion" and describing "and/or" as "a sort of verbal monstrosity which courts have quite generally condemned").

a claim as a matter of law and must not be conclusory." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995); *see also Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976). *Twombly* confirmed this approach by overruling *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), and establishing a plausibility standard for motions to dismiss. 127 S. Ct. at 1966. After *Twombly*, we have said that a plaintiff "must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims . . . , rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007); *see Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315, 321-22 (3d Cir. 2008). While a plaintiff need not set forth "detailed factual allegations," *Twombly*, 127 S. Ct. at 1964, or "specific facts" that describe the evidence to be presented, *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (per curiam), the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. *Twombly*, 127 S. Ct. at 1965 n.3. A district court, therefore, is not required "to divine the litigant's intent and create claims that are not clearly raised," *Bediako*, 354 F.3d at 840, and it need not "conjure up unpled allegations" to save a complaint. *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006) (internal quotation omitted).

In this case, the nine motion-to-dismiss appellants did spell out the limited factual basis for their claims. The grounds upon which their claims rest is

an assertion that Dillard's caused them to be followed and surveilled while they were in the store. Appellants' App. 50. This factual allegation fails to state a claim. Absent an allegation that the plaintiffs attempted to purchase merchandise, the complaint fails to meet the foundational pleading requirements for a suit under § 1981, because it does not satisfy the third element that the plaintiffs attempted to make a contract. Protected activity under the statute does not extend to "the mere expectation of being treated without discrimination while shopping." *Hampton,* 247 F.3d at 1118; *accord Garrett,* 295 F.3d at 101.

Nor does the complaint allege sufficient interference with asserted protected activity to state a claim under the fourth element. An allegation of discriminatory surveillance is insufficient to state a claim under § 1981. *See Garrett,* 295 F.3d at 101; *Hampton,* 247 F.3d at 1108. We believe that the district court's reference to "*per se* interference" – made when applying *Garrett* and discussing the claims of plaintiffs who had not alleged anything "other than being followed or subjected to surveillance" – was simply another way of expressing the same conclusion. We thus agree with the district court that these claims must be dismissed.

B.

The § 1981 claims of four other appellants were dismissed on a motion for summary judgment. We review the district court's decision *de novo,* drawing

all reasonable inferences in favor of the plaintiffs without resort to speculation. *Johnson v. Ready Mixed Concrete Co.*, 424 F.3d 806, 810 (8th Cir. 2005). We conclude that the district court properly applied the law to the applicable facts, and that the grant of summary judgment should be affirmed.

As to appellant Jeff McKinney, we adopt the rationale of the three-judge panel that previously considered this claim. *See Gregory v. Dillard's, Inc.*, 494 F.3d 694, 708 (8th Cir. 2007) (Murphy, J.). McKinney and his cousins had sampled cologne testers while waiting for sales assistance. Although McKinney believed he had previously made eye contact with the sales associate who subsequently moved the cologne testers, there is no evidence that McKinney ever communicated a desire to make a purchase as opposed to testing samples, *cf. Green,* 483 F.3d at 538-39, spoke to the sales associate about any merchandise when she came to the counter where he and his cousins were standing, or had more than a "general interest" in the cologne. *Morris v. Office Max, Inc.*, 89 F.3d at 414. McKinney thus failed to present sufficient evidence of interference with a protected contract interest, and the district court correctly granted summary judgment for Dillard's on this claim. The expansive interpretation of § 1981 now advocated by the principal dissenting opinion leads Judge Murphy and Judge Melloy to dissent from their own panel opinion, *post,* at 488-89, but we adhere to their previous views.

Appellant Crystal Gregory presented evidence that a sales associate followed her as she selected a couple pairs of pants from a rack and took them to a fitting room at Dillard's. Gregory testified that when she came out of the fitting room, the sales associate had a "little smirk on her face," and that two officers were right outside the fitting room leaning on clothing racks. Appellants' App. 286. Gregory said she returned to the fitting room, removed the pants, and then took the pants to the counter, where the sales clerk was "getting ready to ring me up." *Id.* at 287. Gregory, however, was offended by the conduct of the sales associate, and she told the sales clerk that she was not buying the pants. Gregory testified that she then spoke with a manager, but concluded that "she was not of much help, almost as if she did not care, and so I left and I left very upset." *Id.* at 288. The record does not disclose what Gregory asked the manager to do, or what the manager offered to do.

The district court correctly concluded that this evidence does not establish interference with protected activity sufficient to prove the fourth element of a claim under § 1981. As discussed, evidence of surveillance or watchfulness is insufficient to state a claim. *Garrett,* 295 F.3d at 101; *Hampton,* 247 F.3d at 1108. In *Garrett,* for example, three employees monitored the plaintiff throughout his visit to a store, and "at least one of them accompanied him throughout his visit." 295 F.3d at 96. When the plaintiff later complained to a store manager about racially discriminatory treatment, the manager responded with

"patently false" information. *Id.* at 97. Nonetheless, the *Garrett* court held that this active trailing of a minority shopper in the store amounted to no more than an "unadorned" – and legally insufficient – claim that the plaintiff was carefully watched while on the premises. *Id.* at 101. The addition of an inconsiderate smirk on the face of a Dillard's sales clerk, or Ms. Gregory's subjective belief that the store manager was "not of much help," does not meaningfully distinguish this case from *Garrett,* particularly where Gregory admits that Dillard's did not refuse to contract, but rather that a sales clerk was "getting ready to ring [her] up" when Gregory herself declared that she would not make a purchase. Appellant's App. 287.

The claims of Alberta and Carla Turner were properly dismissed for similar reasons. The Turners presented evidence that after Alberta purchased several pairs of shoes at the Dillard's store, she, Carla, and Carla's children began to examine clothing in the children's department. Carla took her daughter to a fitting room, and when she exited the room, a sales associate and a security guard were outside looking at them. Carla asked the security guard why he was following them, but received no answer. The security guard then followed Carla as she walked through the store to rejoin Alberta. As the two women approached the cash register, Alberta asked whether they really wanted to buy the clothes. Carla said that it was Alberta's decision, and Alberta said that she really did not think that she wanted to make the

purchase. Upset by the surveillance, Alberta took the clothing items to the sales counter and told the clerk that she would not make a purchase. She then approached the first sales associate and told her "you just made someone lose a sale," at which time the sales associate allegedly snickered and said, "So?" Appellants' App. 260a; Appellee's App. 170, 185. The Turners then left the store. Alberta returned shortly thereafter and told a manager that Dillard's management needed to let the employees know that "everybody who comes in here is not out to . . . take things from them." When the manager asked what had happened, Alberta said that she did not want to discuss it. Appellants' App. 260a.

As with Ms. Gregory's claim, the evidence presented by the Turners shows at most discriminatory surveillance and watchfulness, which is not actionable interference under § 1981. Dillard's also demonstrated its willingness to contract by selling shoes to Alberta Turner on the same visit, but the Turners nonetheless abandoned their effort to purchase children's clothing. On this record, the district court properly dismissed the claims. *See Arguello,* 330 F.3d at 358-59; *Garrett,* 295 F.3d at 101; *Bagley,* 220 F.3d at 521-22; *Morris v. Office Max, Inc.*, 89 F.3d at 414-15.[10]

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[10] Judge Benton agrees with our conclusion, *supra*, at 12-14, that the plaintiffs' allegation that they were "followed and/or otherwise subjected to surveillance based upon their race" fails to state a claim under § 1981. His opinion, however, also "joins

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We recognize that the plaintiffs were offended by the alleged conduct of Dillard's employees, but we do not believe the facts asserted here are sufficient to establish interference under § 1981. As noted, several courts have concluded that not all offensive conduct of a merchant constitutes actionable interference. *See Arguello,* 330 F.3d at 358-59 (holding no actionable interference where plaintiff voluntarily set product on counter and left without trying to buy it after sales clerk made racially derogatory remarks and mistreated plaintiff's daughter); *Garrett,* 295 F.3d at 101 (holding no actionable interference where plaintiff alleged that three employees monitored him

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the dissenting opinion" with respect to the claims of Gregory and the Turners, and thus joins Judge Murphy's view that the merit of these claims "may be seen" by recognizing that the taking of photographs constitutes actionable interference with the right to make a contract. *Post,* at 43-44 & n.18 (relying on *Hall,* 570 F.2d at 92). With respect, we find these conclusions internally inconsistent.

Judge Benton also relies on language from the First Circuit's decision in *Garrett* to conclude that the alleged conduct of Dillard's involving Gregory and the Turners constitutes actionable interference, because the store's "active surveillance crossed the line into harassment and impaired their ability to make purchases." *Post,* at 478. *Garrett,* however, held that racially-motivated surveillance is not actionable "harassment" under § 1981, and the First Circuit has not defined what conduct it would view as actionable. In any event, as we have explained, *supra,* at 474-75, we do not perceive a material difference between the "surveillance" alleged by the motion-to-dismiss plaintiffs, which Judge Benton agrees is not actionable, and the "active surveillance" of Gregory and the Turners that Judge Benton deems actionable.

throughout his visit to the store because of his race); *Bagley,* 220 F.3d at 519-22 (holding no actionable interference where plaintiff left store after customer was "offended" by sales clerk who refused to serve him, made obscene gesture, and previously stated that "I hate fucking Mexicans"); *Morris v. Office Max, Inc.,* 89 F.3d at 415 (holding no actionable interference under § 1982, although store's conduct was "undoubtedly disconcerting and humiliating" and may have "discouraged" plaintiffs from patronizing the store); *see also Hampton,* 247 F.3d at 1108 (stating that "discriminatory surveillance" is not actionable under § 1981) (citing *Lewis,* 948 F. Supp. at 371); *cf. Elmahdi v. Marriott Hotel Servs., Inc.,* 339 F.3d 645, 652-53 (8th Cir. 2003) (holding that "offensive" racial comments in the workplace fell short of the "severe and pervasive" harassment required to establish a legally cognizable claim of racial harassment under § 1981).

The *Green* decision goes as far as any in declaring that offensive conduct of a retailer amounts to interference, and we decline here to extend it. To recognize a § 1981 claim on the facts in this case, we believe, would dilute the requirement that a defendant "block" or "thwart" the creation of a contractual relationship. *Domino's Pizza,* 546 U.S. at 476; *Green,* 483 F.3d at 539.

By affirming Judge Wright's dismissal of these claims, however, we do not express the view (as suggested by plaintiffs' counsel at oral argument) that a certain level of race discrimination in retail

establishments is "acceptable." Private parties engage in a variety of behavior that individual federal judges may deem unacceptable, but not all of it is unlawful. Whether and how federal law should regulate particular activity that is considered morally or socially unacceptable is a policy judgment made by Congress and the President. That judgment presumably involves inquiry into such matters as the scope and severity of the problem, the potential that private industry or decentralized regulators will address the problem, *see post,* at 21-22 (opinion of Benton, J.) (concluding that the plaintiffs have a cause of action under Missouri law); *post,* at 25 n.14 (opinion of Murphy, J.) (same), the likely effectiveness of federal legislation in solving the problem, and the collateral costs to the national economy of additional federal regulation. In a significant economic sector such as retail shopping, the potential benefits of sanctioning and deterring offensive and undesirable conduct through federal legislation likely must be weighed against the costs of litigation (including nonmeritorious claims) that may be generated by expanded regulation,[11] the potential costs of different

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[11] *See, e.g., Hearings on H.R. 4000, The Civil Rights Act of 1990 – Volume 3: Hearings Before the H. Comm. on Education and Labor,* 101st Cong. 2-8, 229-239 (1990) (statements of Edward E. Potter, President, National Foundation for the Study of Equal Employment Policies, and Theodore Eisenberg, Professor, Cornell Law School) (discussing the costs and benefits of expanding federal anti-discrimination legislation), *reprinted in 6 The Civil Rights Act of 1991: A Legislative History of Public Law 102-166* (Bernard D. Reams, Jr. & Faye Couture eds., 1994).

retail security measures that may be necessitated by such legislation, and the potential increase in shoplifting (presently estimated to be a $13 billion annual drain on retailers)[12] if merchants are discouraged from conducting legitimate security activity for fear of triggering additional lawsuits. We make no judgment about the wisdom of any policy option, but we conclude that § 1981 as presently drawn does not regulate the retail shopping environment to the extent urged by the plaintiffs in this case. Accordingly, we affirm the judgment of the district court with respect to § 1981.[13]

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[12] *See* National Association for Shoplifting Prevention, Shoplifting Statistics, http://www.shopliftingprevention.org/WhatNASPOffers/NRC/PublicEducStats.htm (last visited May 6, 2009); *see also* National Retail Mutual Association, The 2007 National Retail Security Survey – Highlights, http://www.theftdatabase.com/news-stories/2007-nrss-highlights.html (last visited May 6, 2009) (citing statistics from the 2007 National Retail Security Survey conducted by Dr. Richard Hollinger of the Criminology, Law and Society Program at the University of Florida).

[13] Judge Murphy's dissent responds to these observations by ascribing to us the belief that "a certain level of racial harassment is legally tolerable to facilitate modern retailing." *Post,* at 479. Our opinion, of course, says no such thing. We do not know whether the political branches even thought about retail establishments when they amended the statute in 1991 – given that a principal purpose of the legislation was to address a Supreme Court decision concerning employment discrimination, *see* H.R. Rep. No. 102-40, pt. 1, at 89-93 (1991) – much less whether Congress acted with the motivation posited by the dissent. In reaching our decision based on the text of § 1981 and the Supreme Court's guidance regarding the scope of the

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C.

The district court also dismissed with prejudice the appellants' claims under the MHRA. These claims were before the district court based on supplemental jurisdiction under 28 U.S.C. § 1367(a). Whether the MHRA, through its definition of "place of public accommodation," extends to retail establishments is a novel question of state law. Because we conclude that the district court properly dismissed the federal claims, we remand the case with directions to modify the final judgment so as to dismiss the claims under the MHRA *without* prejudice, so they may be decided by the courts of Missouri. *See Birchem v. Knights of Columbus*, 116 F.3d 310, 314-15 (8th Cir. 1997); *Ivy v. Kimbrough*, 115 F.3d 550, 552-53 (8th Cir. 1997) ("In most cases, when federal and state claims are joined and the federal claims are dismissed on a motion for summary judgment, the pendent state claims are dismissed without prejudice to avoid needless decisions of state law . . . as a matter of comity and to promote justice between the parties.") (internal quotation and citation omitted).

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statute, we simply correct counsel's misconception that a court deems "acceptable" any undesirable conduct that is not unlawful, and observe that any additional regulation of the retail shopping environment raises potentially complex policy questions.

CONCUR BY: BENTON (In part).

DISSENT BY: BENTON (In part); MURPHY. BYE, MELLOY, and SMITH.

DISSENT

BENTON, Circuit Judge, concurring in part and dissenting in part.

I agree that the nine motion-to-dismiss appellants fail to state a claim under 42 U.S.C. § 1981, for the reasons stated in Part III.A. of the Court's opinion. Also, in my view, the district court properly entered summary judgment as to Jeff McKinney, for the reasons stated in the second paragraph of Part III.B. of the Court's opinion.

As for the three remaining summary-judgment plaintiffs, I join the dissenting opinion, which follows more closely *Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470, 476-77, 479-80, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006); *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 302, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994); and, *Runyon v. McCrary,* 427 U.S. 160, 168-172, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976). This Court correctly states the law in *Green v. Dillard's, Inc.,* 483 F.3d 533, 537-40 (8th Cir. 2007), *cert. denied,,* 128 S.Ct. 1120, 169 L.Ed.2d 949 (2008). This Court in *Green* cites favorably *Garrett v. Tandy Corp.,* 295 F.3d 94, 101 (1st Cir. 2002), which, in my view, summarizes the controlling principles here:

> In a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movements. So long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases, it is not actionable under section 1981. . . . In other words, the challenged surveillance must have some negative effect on the shopper's ability to contract with the store in order to engage the gears of section 1981.

I believe that, taking all the facts detailed in the other two opinions in the light most favorably to Gregory and the Turners, a reasonable jury could conclude that Dillard's active surveillance crossed the line into harassment and impaired their ability to make purchases.

As for the claims of Gregory and the Turners under the public accommodations provisions of the Missouri Human Rights Act, I would reverse the grant of summary judgment. *See Gregory v. Dillard's, Inc.*, 494 F.3d 694, 710-12 (8th Cir. 2007) (vacated and rehearing en banc granted); *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624-25 (Mo. banc 1995); *cf.* Mo. Rev. Stat. § 209.150.2 (visually, aurally, or physically disabled have right to full and equal treatment in "places of public accommodation," which are examples of "places to which the general public is invited.")

Therefore, I concur in part and dissent in part.

MURPHY, Circuit Judge, with whom BYE, MELLOY, and SMITH, Circuit Judges, join, dissenting.

I respectfully dissent from the majority's failure to give effect to the legislation enacted by Congress to give African Americans equal rights to contract and to purchase goods as possessed by whites. The record reveals that Crystal Gregory, Alberta Turner, Carla Turner, and Jefferson McKinney produced detailed evidence to show that the Dillard's store in Columbia, Missouri engaged in discriminatory treatment of black customers which interfered with their attempts to contract for merchandise. Since they established prima facie cases under § 1981 by raising issues of material fact, their claims should not have been dismissed on summary judgment.

These plaintiffs have produced a voluminous factual record revealing numerous instances of humiliating and disparate treatment experienced by African American customers during their visits to Dillard's. The factual development in this case may be unique not just for the number of discriminatory incidents detailed, but also for the testimony by former Dillard's employees who described from the inside a store practice of targeting minority shoppers for enhanced suspicion, scrutiny, and harassment.

It is noteworthy that the majority largely neglects to discuss the facts of this case until the last quarter of its opinion and then seems to sweep them

aside, concluding that a certain level of racial harassment is legally tolerable to facilitate modern retailing. Any suggestion that as a matter of federal law retailers may actively and intentionally obstruct the efforts of minority customers to purchase goods and services so long as they do not make it impossible would surely come as a surprise to those who enacted § 1981 and later reinforced it by the Civil Rights Act of 1991.

I.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The statute is not primarily a piece of commercial legislation regulating merchants' rights or facilitating impersonal economic transactions. Section 1981 is first and foremost a civil rights statute. It was originally drafted in the immediate aftermath of the Civil War and was intended to protect the rights of the recently emancipated black citizens. The law's purpose is not simply to grant African Americans access to the marketplace; its purpose is to grant to them the *same* access "as is enjoyed by white citizens." *Id.*

Section 1981 traces its lineage to the Civil Rights Act of 1866, 14 Stat. 27 (1866). When Senator Lyman Trumbull of Illinois introduced the Act, Reconstruction efforts had in many instances already produced

measures granting blacks the formal legal rights to buy, sell, own, and bequeath property. *See* Barry Sullivan, "Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981," 98 Yale L.J. 541, 551-52 (1989). But as Senator Trumbull recognized, technical legal entitlements would be of little value where prevailing customs and prejudices burdened their free exercise. The purpose of the Act, Trumbull declared, was to "secure to all persons within the United States *practical* freedom." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

The Supreme Court took note of this Congressional purpose when it held in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), that the Act was intended to reach beyond state action to prohibit instances of private discrimination. Quoting Senator Trumbull, the Court recognized that with respect to the rights identified in the Act – including the right to make and enforce contracts – "the bill would 'break down' *all* discrimination between black men and white men." *Jones*, 392 U.S. at 432 (quoting Cong. Globe, 39th Cong., 1st Sess., 599 (1866)) (emphasis added in *Jones*). The Court also noted that the debate in the House of Representatives reflected a similar understanding of the Act's reach: "It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act." *Jones*, 392 U.S. at 435 (emphasis original).

Not only had Congress declared that racial discrimination was absolutely intolerable in the arena of contract formation, but it also later forcefully reversed an attempt by the Supreme Court to constrict the boundaries of that arena. The Court had attempted to limit the reach of § 1981 in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), through a narrow interpretation of the right "to make and enforce contracts." The Court reasoned that the protected right "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations" and held that conduct leading up to or following the actual moment of contract formation was beyond the scope of § 1981. *Id.* at 176. Congress specifically overruled *Patterson* in the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071. The 1991 Act also added a new subsection to § 1981 which expansively defined protected contract rights to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

The House Judiciary Committee, in recommending the 1991 Act for approval, noted its intention to "restor[e] the broad scope of Section 1981," H.R. Rep. No. 102-40, pt. 2, at 2 (1991), and "to bar *all* racial discrimination in contracts," *id.* at 37, U.S. Code Cong. & Admin. News, at p. 731 (emphasis added). The House Education and Labor Committee took specific aim at the Supreme Court's attempted limitation

of § 1981 when it identified a "compelling need . . . to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination in *all* phases of the contractual relationship." H.R. Rep. No. 102-40, pt. 1, at 92 (1991), (emphasis added).

To hold that a retail store may engage in intentional practices designed to hinder or burden an African American's attempts to make and enforce contracts fundamentally misapprehends Congress's intentions in enacting § 1981. It is not enough that merchants grudgingly afford African Americans *some* access to their goods and services. By § 1981's plain terms and its unambiguous history, merchants must offer the *same* access as is enjoyed by all other customers, regardless of race.

II.

After initially disposing of the claims of nine of the appellants for failure to state a claim, the district court granted summary judgment to Dillard's against Crystal Gregory, Alberta and Carla Turner, and Jefferson McKinney. I turn first to the § 1981 claims of these four plaintiffs.[14]

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[14] Gregory and the Turners also brought state law claims under the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.065 (2002). The majority, having upheld the dismissal of all federal claims, remands the state claims for dismissal without prejudice. But because the district court erred in ruling against Gregory and the Turners on their federal claims, its

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This court has agreed on the four elements of a § 1981 claim: (1) membership in a protected class, (2) discriminatory intent on the part of the defendant, (3) engagement in a protected activity, and (4) interference with that activity by the defendant. *See Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004). In this case all appellants satisfy the first element. As to the second element, the majority correctly notes that Dillard's does not urge dismissal on the ground that the plaintiffs have failed to present a disputed issue of fact regarding discriminatory intent. Rather, both Dillard's and the majority focus on the third and fourth elements, challenging the legal sufficiency of the plaintiffs' evidence and allegations regarding whether Dillard's actionably interfered with activities protected by § 1981. I will examine these elements in turn, but it is first important to relate the evidence produced by the summary judgment plaintiffs.

A.

On Dillard's motion for summary judgment, the four plaintiffs – as nonmoving parties – were entitled to have all facts considered in the light most favorable to them and to have all reasonable inferences drawn in their favor. The same principle applies

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holding on the MHRA should be revisited for reasons discussed in the earlier panel opinion. *See Gregory v. Dillard's, Inc.*, 494 F.3d 694, 710-12 (8th Cir. 2007), *vacated and reh'g en banc granted.*

during our de novo review of the district court's grant of summary judgment. *McLean v. Gordon,* 548 F.3d 613, 616 (8th Cir. 2008).

Crystal Gregory was a 31 year old full time student and the wife of a police officer when she visited the Columbia Dillard's in February 2001 with the specific intent to purchase a "dressy outfit." As she examined the merchandise and made her selections, a sales associate named Tracy asked if she could help. Despite Gregory's assurances that she did not require assistance, Tracy followed her closely as she shopped in the Ralph Lauren section. There, Gregory chose a pair of pants she liked and carried them to a fitting room to try on. When she emerged with the pants, she found Tracy guarding the fitting room door with her arms crossed and a smirk across her face. Two police officers were also waiting just outside the entrance to the fitting rooms. Gregory described the atmosphere as "very hostile." Offended and humiliated by Tracy's conduct and her evident suspicions, Gregory asked to speak to a manager. The manager on duty seemed not to take Gregory's complaint seriously, and Gregory left the store in disgust without completing her intended purchase.

Gregory further testified that she could not recall a time when she had visited the Columbia Dillard's and was not closely trailed by store employees. She also stated that on one shopping visit she had overheard a sales associate characterize African Americans as thieves.

Alberta Turner was a 52 year old daycare provider when she and her adult daughter Carla, an insurance agency employee, patronized Dillard's Columbia store on Memorial Day 2002. Alberta and Carla were regular customers who, despite having previously purchased hundreds of dollars worth of merchandise from the store, had both been routinely subjected to overbearing behavior on the part of store personnel. On Memorial Day the two women were accompanied by Alberta's two granddaughters, one of whom was Carla's daughter.[15] Alberta and Carla purchased several pairs of shoes for the children before splitting up to continue shopping. Carla selected several outfits for her daughter who tried them on in a fitting room. As mother and daughter exited the fitting room, they were confronted by a sales associate and a security guard. The sales associate stared at Carla's Dillard's bag, which held the previously purchased shoes, but did not ask to examine its contents. Nevertheless, the guard began trailing Carla closely as she walked back to the department where her mother was doing her shopping. When Carla asked the guard why he was following, he made no answer. Alberta became upset to see her daughter treated in this manner and decided against making her intended purchase. Alberta started to challenge

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[15] Felicia Turner – daughter to Alberta and sister to Carla – chose to wait in the parking lot on Memorial Day rather than expose herself to the type of harassment she and other members of the family had previously experienced at Dillard's. Felicia was one of the plaintiffs dismissed under Rule 12(b)(6).

the security guard about his behavior but quickly changed her mind when she realized how upset her granddaughters had become by what was occurring. Before leaving the store, Alberta told a sales associate that the store had just lost a large sale. The employee asked with a "weird grin," "So? So what?"

After Alberta reached her car in the parking lot, frustrated with the family's experience inside Dillard's and surrounded by crying children, she decided she should go back inside the store to protest to a manager. She located a manager and asked him to inform his employees that "everybody who comes in here is not out to . . . take things from them." When the manager inquired about her experience, Alberta found herself too upset to repeat it.

Jefferson McKinney was in his early fifties and was a United Parcel Service employee when he visited the cologne counter at the Columbia Dillard's. He testified that he made eye contact with a sales associate in an attempt to gain her attention, but the associate ignored him in favor of later arriving white customers. While waiting to be served, McKinney and his two cousins tested various cologne samples displayed on the counter. After having ignored McKinney and his cousins for fifteen minutes, the sales associate finally approached their counter. But instead of speaking to them or offering assistance, she simply swept the counter samples away. One of McKinney's cousins asked the associate why they were being ignored and asked to speak to a store manager. Upset at the associate's "rude . . . tone" in response,

McKinney left the store without completing a purchase.

B.

As there is no dispute that the plaintiffs in this case are African American and therefore members of a protected class, I begin my analysis with the second element of a § 1981 claim. That element requires that plaintiffs prove discriminatory intent on the part of defendants. Dillard's generally denies that its managers and employees acted with racial animus, but as the majority correctly notes, the company has not urged this ground for dismissing the plaintiffs' claims on summary judgment. The majority likewise declines to discuss this element, reserving its analysis for the third and fourth components of a § 1981 claim. Nevertheless, for the sake of completeness, I will review the evidence supporting the plaintiffs' allegations that Dillard's and its personnel acted with racial animus in targeting African American customers for harassing treatment.

Direct or circumstantial evidence may be offered for a prima facie showing of discriminatory intent. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997). Since direct evidence is rarely available, *see id.*, a systematic practice of affording black customers different treatment provides circumstantial evidence of discriminatory intent. *See White v. Honeywell*, 141 F.3d 1270, 1276 (8th Cir. 1998).

In this case we have not only the testimony of the four summary judgment plaintiffs that they were greeted with hostility and suspicion, but we also have testimony from former employees of Dillard's relevant to establish a custom and practice there of singling out African American shoppers for inferior treatment and intimidation.

Former men's fragrance saleswoman Tammy Benskin testified that the security code "44" was customarily announced over the store's intercom system whenever an African American entered the store. Benskin also stated that the code was announced "ninety percent more" for black shoppers than for white shoppers. She further reported that the store manager and his assistants routinely subjected black customers to intense scrutiny and surveillance while allowing white patrons to browse the store undisturbed.

Former men's department salesman Rick Beasley testified that black customers faced higher burdens than white customers when attempting to return purchases without a receipt.

Former employee Theresa Cain testified that security personnel were so disproportionately aggressive in monitoring black customers that they often missed similar offenses committed by white shoppers.

Police sergeant Kenneth Gregory (husband of appellant Crystal Gregory) worked as a security guard at the Columbia Dillard's during the 1990s. He testified that black customers were subjected to more

searching scrutiny and surveillance and that suspected white shoplifters were allowed to surrender their stolen merchandise and leave the store while suspected black shoplifters were detained and arrested.

Maren Snell had worked in the women's fragrance department of Dillard's Columbia store. She testified that she observed store employees refuse a black customer's attempts to return merchandise despite providing proof of purchase labels while accepting the returns of white customers who lacked receipts. She stated that she was instructed by supervisors to "watch those black kids" and not to give fragrance samples to black girls since "they're not going to buy anything anyway."

In addition to the testimony of these former employees, the depositions of those appellants dismissed for failure to state a claim strongly corroborate the routinely hostile and racially intimidating atmosphere within the Columbia Dillard's. Although these plaintiffs were dismissed on the basis of their pleadings, their deposition testimony developed during discovery is relevant to show a pattern or practice of intentional discrimination. *See* Fed. R. Evid. 404(b).

Snell was not only a former Dillard's employee. She was also an occasional customer and was one of the black complainants dismissed by the district court for failure to state a claim. She testified that she herself had been targeted for discriminatory

surveillance and trailed throughout the store during off duty shopping trips.

Appellant Arnel Monroe is a special education teacher and a high school football coach. He noted that Dillard's was at one time the only local place to shop for professional apparel. He testified to being followed by a Dillard's security guard as he carried a Kenneth Cole shirt in which he was interested to look at jeans. Monroe was shopping with his daughter, who was upset by the guard's behavior. Monroe felt so humiliated by it that he abandoned his intended purchase of the shirt.

Plaintiffs LaShanda Wisham, Capria Lee, Felicia Turner, and Treva Gage gave similar accounts of harassing surveillance and close, intimidating scrutiny at the Columbia Dillard's. Turner and Gage testified that the behavior of its employees had reached such an intolerable level that they eventually decided not to even go there anymore.

Appellant Michael Warrick is general counsel to Missouri's Department of Natural Resources. He testified that he, too, was trailed by store personnel during a trip to the Columbia Dillard's and that a sales associate went so far as deliberately to bump into him in an effort to dislodge any concealed merchandise. Warrick says he was so infuriated by this extraordinary tactic that he could not return to Dillard's for four years.

Appellant Debra Hamilton testified that not only had she regularly been followed while shopping at the

Columbia Dillard's, but also that she had been passed over at a check out counter in favor of later arriving white customers.

Appellant Michael Richmond testified that when he requested to see a particular piece of jewelry locked in a Dillard's display case, the sales associate suggested he instead look at lower priced merchandise. Richmond said he left the store in frustration after responding with a swear word to what he considered insulting race based treatment. He complained about the incident to an assistant manager who apologized and suggested he contact the store manager. Richmond also testified that he was routinely followed when he shopped at Dillard's and that on at least one occasion a sales associate purposely avoided him rather than help him complete a purchase.

Plaintiff Michael Butler ultimately reached a settlement with Dillard's on his claim of discriminatory treatment, but his deposition testimony illustrates the extra burdens the Columbia Dillard's placed on African American customers. Butler testified that he attempted to exchange a pair of defective shoes which he had purchased the night before, but he accidentally left his receipt at home. Dillard's employees attempted to confiscate the shoes, stating that he might have stolen them. Butler was upset and requested that a manager contact him. In the following days, Butler repeatedly called Dillard's seeking a manager to whom he could complain about having been treated as a thief. After more than a

week passed, a manager finally returned Butler's calls and asked that he bring the shoes in with a receipt. Butler did so, but another week passed before a replacement pair arrived. He received no apology for having been treated as a thief or for the store's delay in responding.

The facts developed at the summary judgment stage thus made out a prima facie case that Dillard's customarily and intentionally singled out African American shoppers for race based harassment and discriminatory provision of services.

C.

It is agreed that § 1981 does not provide a general cause of action for private racial discrimination, *see Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001), and that the third element – engagement in a protected activity – requires that plaintiffs have an interest covered by the statute, in this case the right to make and enforce contracts on the same terms and under the same conditions as white customers. To satisfy this element "[i]n the retail context, § 1981 plaintiffs are required to demonstrate that they actively sought to enter into a contract with the retailer. There must have been some tangible attempt to contract." *Green v. Dillard's, Inc.*, 483 F.3d 533, 538 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 1120, 169 L. Ed. 2d 949 (2008) (internal citations and quotation marks omitted).

It is difficult to generalize about when a shopper's interactions with a merchant ripen into a protected "tangible attempt to contract" because by definition the determination must be fact based. What is clear, however, is that § 1981 prohibits discrimination in "all phases and incidents" of a contractual relationship, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), thus clearly reaching conduct preceding the actual consummation of a contract. The statute "protects the would-be contractor along with those who already have contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006). The process of contract formation is admittedly fluid: "[e]ach time a customer takes an item off the shelf, a new contract looms, and each time the item is returned, the potential contract is extinguished." *Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002). But it is precisely this process which is protected by the right to *make* and enforce contracts. The statute's reach "extends . . . beyond the four corners of a particular contract; the extension applies to those situations in which a merchant, acting out of racial animus, impedes a customer's ability to enter into . . . a contractual relationship." *Id.*

The steps toward contract formation will vary by context. The purchase of a standardized commercial product – a can of soda or a packet of chewing gum – from a low service convenience store requires virtually no interaction between customer and clerk

aside from the tender of payment. Mere seconds may elapse between the formation of a customer's intent to purchase and the final exchange of cash for goods. The protected activity may therefore be quite brief. On the other hand, a consumer's purchase of expensive durable goods – a new washer and dryer or a new car – often involves significant customer education, inspection of wares, comparison of prices and features, negotiation of financing agreements, and extended assistance by informed sales agents. In such circumstances the process of contract formation may be quite lengthy, and the customer's specific intentions may wax and wane throughout. The set of protected activities may therefore comprise a wide range of precontractual interactions and services.

In the specific context of department store shopping, it is incontrovertible that customers will often want to inspect garments for quality and fit or sample fragrances for scent before concluding a purchase. Modern retailers such as Dillard's place much of their merchandise on open display, inviting browsers to examine, sample, and inspect their goods, all with an eye towards generating sales. The atmosphere and ambience of a high end retail store are part of its overall allure and contribute both to the shopping experience and the customer's willingness to consider goods for purchase. When a shopper in good faith takes advantage of these opportunities, she is surely protected by § 1981. It would be remarkable indeed to conclude otherwise and to permit a merchant out of pure racial animus to deny African American

customers access to fitting rooms so long as it allowed such customers to purchase outfits straight from the rack. These considerations are particularly important in light of the original 1866 Act's focus on "practical freedom," Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull), and the purpose of the 1991 amendments to "ensure that federal law prohibits all race discrimination in all phases of the contractual relationship," H.R. Rep. No. 102-40, pt. 1, p. 92.

Even a commercial establishment's seemingly gratuitous services can create contractual obligations. In *Barfield v. Commerce Bank, N.A.*, 484 F.3d 1276 (10th Cir. 2007) (McConnell, J.), an African American without an account at the defendant bank had requested that it make change for a $50 bill. He was refused service even though a similarly situated white man making the same request was subsequently given change without question. The Tenth Circuit held that the plaintiff made out a § 1981 claim. The court held that the request for change had been an offer to contract despite the apparent lack of financial gain to the bank for providing such a service. "[A] customer's offer to do business in a retail setting qualifies as a 'phase[ ] and incident [ ] of the contractual relationship' under § 1981." *Id.* at 1278. *Barfield* reaffirmed the principle that a merchant's offer of unbargained for gratuities can create contractual relationships, for "a retail establishment's offer of a free service or sample in fact could constitute a contract within the meaning of Section 1981. The establishment receives a benefit from such offers

because 'to sample those products, the customer would traverse the store, perhaps eyeing other merchandise for purchase.'" *Id.* at 1280 (quoting *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1105 (10th Cir. 2001)).

Even if preliminary interactions do not themselves create binding contractual duties, this court has recognized that the process of contract formation is protected under § 1981. The standard our court has adopted in order to state a § 1981 claim during this precontractual phase is that a plaintiff must have "actively sought" or made "some tangible attempt" to enter a contract. *Green*, 483 F.3d at 538. But this has to be understood in light of the realities of modern merchandising. A shopper may, for example, display an intent to contract by taking an item to a fitting room to make sure it looks right; if the fit is not right the process ends there. By reconsidering a potential purchase, a shopper may also abandon a good faith intention to purchase without losing the protection of the statute. If an irreversible commitment to purchase were always necessary before a plaintiff may state a § 1981 claim, then retailers could openly and actively discourage minority shoppers from ever reaching that point and thereby render § 1981 a dead letter.

This dynamic is well recognized in other § 1981 contexts, including that of discriminatory treatment by restaurants. In *Eddy v. Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), *vacated on other grounds and remanded*, 128 S. Ct. 2957, 171 L. Ed. 2d 879

(2008), the Fourth Circuit upheld the § 1981 claim of a black family that had sought service at a Waffle House restaurant in South Carolina. The family had been greeted by a waitress who allegedly remarked, "We don't serve niggers here." Although the family left without ever ordering food or consummating a contract, the court held that "dining at a restaurant generally involves a contractual relationship that continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased." *Id.* at 678 (quoting *Arguello v. Conoco, Inc.*, 330 F.3d 355, 360 (5th Cir. 2003)). There is no principled reason to distinguish between a restaurant's valuable precontractual services and those offered by a high end department store. In either setting "a reasonable person would not expect to be served in an openly hostile environment." *Eddy*, 482 F.3d at 678.

Taken as a whole, the cases in this circuit and elsewhere suggest that whether a customer has demonstrated a sufficiently tangible interest in a merchant's goods requires careful attention to the plaintiff's intentions. In this circuit we have held that the necessary intent was revealed and "the contracting process began as [the customer] looked at the watches in the display case and selected which one she was interested in." *Green*, 483 F.3d at 538. "It is intent to purchase . . . that is needed to create a contractual interest." *Id.* at 539. The Sixth Circuit similarly adopted an intent to purchase standard when it held that a customer who had selected items for purchase and placed them in her shopping cart

and who had the necessary means and intention of completing a sale was protected by § 1981. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 874 (6th Cir. 2001). *Christian* is in accord with an earlier Sixth Circuit case in which two African Americans were asked to leave a whites only club before they had a chance to order drinks. *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990). The court held that the plaintiffs' failure to request service was not fatal to their § 1981 claim:

> If they were asked to leave in order to prevent them from purchasing soft drinks, [this] could be found to be merely the method used to refuse to contract. Were it otherwise, commercial establishments could avoid liability merely by refusing minorities entrance to the establishment before they had a chance to order.

Id. at 243.

Notably, the *Green*, *Christian*, and *Watson* opinions recognized that a protected contractual relationship arises during the contract formation process and well before the fleeting moment when payment is tendered for the purchased goods. None of the cases purports to set a lower bound below which such interests as a matter of law are insufficient to state a claim under § 1981.[16] In fact there is no well marked

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[16] In opposition the majority cites *McQuiston v. K-Mart Corp.*, 796 F.2d 1346 (11th Cir. 1986), a state law product liability case in which the dispositive issue was whether the

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lower boundary aside from the common sense proposition that mere passersby and loiterers have no rights protected by § 1981. The majority cites the Tenth Circuit's decision in *Hampton* for its conclusion that § 1981 does not protect individuals "from harassment upon entering a retail establishment" and that a successful § 1981 claim must allege "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Id.* at 1118. But the section of *Hampton* cited approvingly by the majority concerned a plaintiff whose claim was dismissed precisely because she never had any intention of buying merchandise and whose "shopping" consisted merely in accompanying her aunt to the defendant's store. *Id.* The aunt, by contrast, completed a purchase but was later harassed by a store security guard as she attempted to exercise her contractually acquired right to redeem a coupon for a free fragrance sample. The court upheld the aunt's § 1981 claim along with the jury's award of $56,000 in compensatory damages and $1.1 million in punitive damages. *Id.* at 1115 & 1117.

The Fifth Circuit's holding in *Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743 (5th Cir. 2001), is similarly unremarkable. In that case the court held that "a plaintiff must establish the loss of an actual,

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retailer would be liable for a shopper's injuries under an implied warranty. In contrast, § 1981 cases are correctly concerned with the steps in contract formation and whether the retailer interfered with or thwarted the shopper's intent to contract.

not speculative or prospective, contract interest." *Id.* at 751. But as with *Hampton,* the facts of the case put the holding in the proper context. Morris had asserted a § 1981 claim based on the defendant's banishing her from returning to its store following her arrest for suspected shoplifting. The court held that the mere possibility that Morris, at some future point during her term of banishment, might have sought to shop at Dillard's was too speculative to support a claim under § 1981. *Id.* A shopper who asserts that she may one day seek to shop at a defendant's store is easily distinguished from a shopper who establishes her actual good faith intentions by entering a store and examining its merchandise for the purpose of purchasing items which meet her tastes, needs, and budget. The former, as the Fifth Circuit notes, asserts "speculative or prospective" interests. The latter demonstrates a tangible interest in consummating a purchase.

The Seventh Circuit appeared to set a restrictive standard for § 1981 cases in *Morris v. Office Max, Inc.,* 89 F.3d 411 (7th Cir. 1996), holding that plaintiffs require more than a general interest in merchandise to state a successful claim. But the Seventh Circuit in *Bagley v. Ameritech Corp.,* 220 F.3d 518 (7th Cir. 2000), subsequently confirmed that *Office Max* does not require that plaintiffs go so far as to tender payment for desired merchandise in order to satisfy the tangible attempt test. In *Bagley,* the court held that if a plaintiff enters a store for the purpose of purchasing merchandise, he is protected under § 1981

even if he does not specifically communicate that intention to store employees. *Id.* at 521. To hold otherwise, the court reasoned, would lead to a "reprehensible" result in which a store could avoid liability under § 1981 simply by preemptively refusing service to African American customers before they had a chance to signal their intent to make a purchase. *Id.*

There appears to be common agreement that an active request to purchase goods triggers § 1981's protections, while idle loitering with no intent to purchase does not. But between these two extremes lies a vast middle ground of behaviors and intentions, and determining when an individual has demonstrated the necessary good faith interest in purchasing goods requires "careful line-drawing, case by case." *Garrett,* 295 F.3d at 101. In the present case the four plaintiffs dismissed at summary judgment have at the very least created genuine factual disputes as to their intentions in visiting Dillard's Columbia store.

As previously described, Crystal Gregory visited Dillard's in February 2001 for the specific purpose of purchasing a "dressy outfit." She selected a pair of pants and entered a fitting room to try them on. She ultimately chose not to purchase the pants after being humiliated by store security personnel. Nevertheless Gregory, who had shopped at Dillard's on several previous occasions, made a tangible attempt to purchase goods from Dillard's when she entered the store with the intention to buy a specific type of outfit and when she "looked at" and "selected" an item matching

her interest. *Green,* 483 F.3d at 538; *see also Christian,* 252 F.3d at 874 (acknowledging a protected interest when customer who had necessary intention and means of payment selected an item for purchase).

Alberta and Carla Turner were also good faith customers of Dillard's who had previously spent hundreds of dollars at the Columbia store. During their Memorial Day visit, the two women purchased several pairs of shoes for Alberta's granddaughters. Afterwards Carla and her daughter selected several outfits for the girl to try on in a fitting room. Selecting items of interest and trying them on in a fitting room were more than sufficient to establish a tangible attempt to contract. Alberta had meanwhile continued to shop with her granddaughter and remarked to a sales associate after the humiliating treatment of Carla that Dillard's had lost a large sale. These facts indicate Alberta had intended to make additional purchases at the store that day.

Jefferson McKinney visited the cologne counter at the Columbia Dillard's with two of his cousins. Their arrival at a specialized service counter indicates their interest in a particular type of product, namely men's fragrances. McKinney made eye contact with a sales associate in an attempt to engage her attention, but was ignored in favor of white customers. While waiting, McKinney and his two cousins tested cologne samples displayed on the counter. The majority suggests that testing fragrance samples is activity beyond the scope of § 1981. But a customer's inspection of a merchant's openly displayed products

as part of a good faith attempt to select an item for purchase is a critical step in the formation of a contract.

To focus too narrowly on the discrete moment when payment is actually exchanged for merchandise would be to resurrect the approach of *Patterson,* in which the Supreme Court excluded from § 1981 protection any conduct leading up to and following contract formation. Congress explicitly rejected this interpretation in the 1991 amendments to the statute and reaffirmed its intention that § 1981 sweep widely enough to cover all "phases and incidents" of the contractual relationship. *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 302, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). McKinney's attempt to engage a sales associate for assistance and his inspection of several fragrance samples indicated he was more than an idle passerby and were enough to present a factual dispute as to his intentions and purpose.

All four of the summary judgment plaintiffs have therefore presented enough evidence to establish a prima facie case regarding their engagement in activity protected under § 1981.[17]

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[17] The majority charges the dissent with "dissent[ing]," *ante* p. 15, from the panel majority opinion in respect to Jefferson McKinney. The process was rather one of reconsideration of his case after examining every line of deposition evidence in the record. McKinney's evidence as well as the extensive corroborating material in the record led to the conclusion that he should not have been dismissed on summary judgment. (Thorough

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D.

The fourth and final element of a § 1981 claim requires interference by the defendant with the plaintiff's protected interests. In our circuit interference which "as a whole thwart[s] [a customer's] attempt to make and close a contract" is actionable. *Green*, 483 F.3d at 539. Although the majority recognizes this holding, it would like to confine it to instances where a merchant actually makes the formation of a contract impossible. Under such reasoning, a customer who abandons an intended purchase for any reason has merely been deterred rather than thwarted and therefore cannot state a claim under § 1981. Not only will *Green* not support this approach, it flatly precludes it.

In *Green* a husband and wife had completed one purchase and were being assisted in another when a hostile sales associate – who had previously refused them service – referred to them as "fucking niggers." Although the salesperson helping them was prepared to complete the sale, the upset Greens asked for a manager, declined to complete the second transaction, and rescinded the first one. While the Greens had not in any physical sense been blocked from making or enforcing a contract, they had been insulted and deterred by the one associate's continuing "pronounced hostility" and her "forceful racial insult"

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reexamination of the record also led to a corrected summary of Michael Butler's experience at Dillard's.)

which we concluded actionably interfered with their attempt to close a contract and violated the Greens' § 1981 rights. *Green,* 483 F.3d at 539. *Green* teaches that a retailer through its employees may create an atmosphere of such hostility and intimidation that it is sufficient to thwart the exercise of a customer's § 1981 rights, causing customers to abandon their intended purchases.

The majority claims it is simply declining "to extend" *Green, ante* at 18, when, in fact, its opinion would effectively replace the rule of our own circuit with a much stricter standard imported from the Fifth Circuit. It cites *Arguello v. Conoco, Inc.,* 330 F.3d 355 (5th Cir. 2003), for the proposition that a customer's voluntary abandonment of a purchase cannot be causally linked to a merchant's harassing or hostile conduct. *See also Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000) (taking an approach similar to *Arguello's*). Not only is *Arguello* not the law of this circuit, it is distinguishable from the case before the court since the customer who abandoned his transaction there had only witnessed abusive behavior directed at another and had not himself been the target.

Other courts look more carefully at the nature of the interference in judging what is actionable. In *Hampton* the Tenth Circuit held that a security guard's "interruption" of a customer's attempt to redeem a coupon was actionable interference even though the intended transaction had not been rendered impossible. *Hampton,* 247 F.3d at 1106. Refusal

to accept a check from a black customer was held to be actionable interference under § 1981 by the Fourth Circuit in *Williams v. Staples, Inc.*, 372 F.3d 662, 668 (4th Cir. 2004). Moreover, an insult directed at one member of a group can create an atmosphere hostile enough to chill the rights of other members since "[o]ne would certainly not expect anyone in the party to stay and feel welcome when other members of the same party had been subject to racial epithets. By denying service to one member of the party, the defendant effectively denied service to the other members of the same party." *Eddy*, 482 F.3d at 678.

Section 1981 does not require as a matter of law that within the context of closing a contract a customer persist in her attempted purchase despite overt racial hostility right up until a merchant flatly denies her service and forcibly ejects her from the premises. To suggest otherwise would enable a retailer to create an environment so odious to minority customers that they will flee immediately upon entering a store and be unable to obtain merchandise held out to the public for sale. Based on the common meaning of interference, the history of § 1981, its purpose to eliminate all racial discrimination in contractual relationships, and the established precedents of this and other circuits, it is clear that a merchant's discriminatory conduct is actionable when it obstructs, hinders, or deters an African American customer from making her intended purchases. The question before the court, of course, is whether the facts of this case,

viewed in a light most favorable to the summary judgment plaintiffs, establish such interference.

Gregory and the Turners all allege that they were subjected to discriminatory monitoring which interfered with their shopping at the Columbia Dillard's. Such treatment, when it is racially motivated, states a § 1981 claim as may be seen in *Hall v. Pennsylvania State Police,* 570 F.2d 86 (3d Cir. 1978). In that case, a bank photographed any suspicious black person who entered its premises but no others. Although the photography was undertaken at the request of the police, the Third Circuit held that a black customer subjected to it had made out a § 1981 claim. As the court explained, "[s]ection 1981 obligates commercial enterprises to extend the *same* treatment to contractual customers 'as is enjoyed by white citizens.'" *Id.* at 92 (emphasis added). Because the photography policy was directed only at black customers, the court concluded that the plaintiff had "received disparate, and because it was based on race, disparaging treatment for which the record offers no justification" and which the court determined was sufficient to state a § 1981 claim. *Id.* The evidence of disparaging treatment produced by the summary judgment plaintiffs in this case also shows overt discrimination "for which the record offers no justification."[15]

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[15] The majority suggests that this dissent's discussion of *Hall* opens the door to § 1981 claims arising from "surveillance unknown to a shopper," *ante* at 11, but the Third Circuit's opinion does not indicate whether or not Hall or other customers

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The majority attempts to distinguish *Hall* by suggesting its holding is limited to cases in which a preexisting customer is subjected to differential race based treatment, but the court's decision does not indicate whether the plaintiff had been a customer or not. In fact the state police policy was directed against "suspicious" blacks who might enter the bank seeking directions, change, or "for no apparent reason." *Id.* at 88. The decision turned not on the third element of a § 1981 claim (protected interest), but on the fourth (actionable interference). The plaintiff's photograph had been taken as part of "a racially based surveillance scheme," *id.* at 92, and the bank violated § 1981 because it interfered with his protected interest by "offer[ing] its services under different terms dependent on race." *Id.*

After attempting to distinguish *Hall,* the majority argues that as a matter of law discriminatory surveillance cannot support a § 1981 claim, and it follows the district court's mistaken lead by citing for this proposition *Garrett* and *Hampton.* Reliance on these cases is curious for *Garrett* merely holds that "[u]nadorned" surveillance is legally insufficient: "[s]o long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make

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were aware they were photographed while in the bank. What is clear is that the bank had a routine, race based policy of targeting black visitors for discriminatory treatment. In this sense the bank's behavior parallels Dillard's policy of announcing a code "44" when an African American entered the Columbia store.

and complete purchases, it is not actionable under section 1981." *Garrett*, 295 F.3d at 101. Obviously the court believed that harassing watchfulness or surveillance which "impairs a shopper's ability to make and complete purchases" crosses the line and is actionable, for when surveillance has a "negative effect" on a "shopper's ability to contract with the store," it will "engage the gears of section 1981." *Id.*; *cf. Hampton*, 247 F.3d at 1108 ("[E]vidence of discriminatory surveillance . . . *on its own* [is] not actionable under § 1981.") (emphasis added).

Disregard for the underlying facts of a case can lead a reader astray. The plaintiff in *Garrett* was indeed watched as he shopped the aisles of the defendant's store, but "his amended complaint leaves no doubt but that, during his visit to the store, [its] employees were helpful and courteous; they facilitated his purchase of the items he selected, and even reached out to other branches in an effort to locate an out-of-stock product that he wished to buy." *Garrett*, 295 F.3d at 101. In short, the *Garrett* plaintiff had not "alleged that the surveillance entailed harassment or otherwise interfered with his ability to make desired purchases." *Id.* The plaintiffs in the current case present a markedly different set of facts and allegations. The evidence suggests that Dillard's personnel sometimes crossed the line into actionable harassment and withheld standard services, courtesies, and

assistance from black customers which interfered with their attempts to contract.[19]

Gregory testified that she was routinely trailed by Dillard's employees whenever she shopped at the Columbia store and that she had overheard a sales associate refer to African Americans as thieves. During her February 2001 visit to Dillard's, Gregory was closely followed by a sales associate identified as Tracy. Although Gregory assured Tracy that she did not need assistance, Tracy shadowed her as she examined merchandise. After selecting a pair of pants and trying them on in a fitting room, Gregory emerged to find Tracy guarding the room with her arms crossed and smirk on her face. Two police officers waited nearby. Gregory testified that the atmosphere was "very hostile."

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[19] In footnote 10, *ante* at 17 n.10, the majority again overlooks the critical limitation the *Garrett* court included in its analysis. The First Circuit indicated only that "[u]nadorned" surveillance could be permissible under § 1981, but it also made clear that watchfulness could "cross[ ] the line into harassment" and thereby become actionable interference. *Garrett*, 295 F.3d at 101. The majority's suggestion that it can find no "material difference" between the surveillance in *Garrett* and the alleged conduct of Dillard's in the current case, *ante* at 17 n.10, is puzzling. While the store employees in *Garrett* were "helpful and courteous," *Garrett*, 295 F.3d at 101, the plaintiffs in this case have testified that Dillard's personnel were "rude" and "hostile." A factfinder could reasonably determine from the evidence here that the attitude and demeanor of Dillard's personnel had a "negative effect" on the plaintiffs' "ability to contract with the store" and thereby "engage[d] the gears of section 1981." *Id.*

On Dillard's motion for summary judgment, we are obliged to consider these allegations in the light most favorable to Gregory. A reasonable jury could certainly conclude from Gregory's evidence that the behavior exhibited by Tracy was hostile and intimidating. Dillard's may argue that a more patient shopper would have endured this treatment and persisted in making a purchase in spite of it. The proper forum for questions of fact, however, is at trial and not here on review of a motion for summary judgment. Because Gregory has presented a genuine issue of material fact as to whether Dillard's surveillance crossed the line into harassment, summary judgment was inappropriate.

The Turners tell a similar story. Alberta and Carla were regular customers at the Columbia Dillard's and were familiar with the store's practice of harassing and intimidating African American shoppers. During their Memorial Day visit, Carla was confronted by a sales associate and a security guard as she exited a fitting room in which her daughter had tried on an outfit. Without any comment or inquiry the sales associate stared at Carla's shopping bag in which she carried shoes she had purchased at Dillard's earlier in the day. The guard closely followed Carla as she walked to rejoin Alberta in another department. Carla asked the guard why he was following her, but he ignored her. Alberta was angered to see her daughter treated with such suspicion and hostility. Alberta began to confront the security guard about his behavior, but changed her

mind upon seeing how upset her granddaughters had become during the episode. The whole experience was so unsettling to the family that Alberta returned to the store from the parking lot to let a manager know how upset she was by the interference with their shopping.

For purposes of summary judgment, our obligation is to examine these facts developed in discovery in the light most favorable to the Turners. Since Alberta and Carla Turner have presented genuine issues of material fact as to whether the conduct of Dillard's employees was harassing and intimidating enough to thwart their attempts to purchase goods and to state claims under § 1981, summary judgment was inappropriate.

Finally, McKinney alleges that he tried to purchase cologne at Dillard's Columbia store but that he received no assistance. McKinney testified that he attempted to catch the attention of a sales associate but that she instead repeatedly assisted later arriving white customers. While waiting for approximately fifteen minutes, McKinney and two of his cousins tested several fragrance samples displayed on the counter. When the sales associate finally approached, she swept the samples away rather than offer any service. McKinney testified that the associate adopted a "rude . . . tone" which caused him to leave the store rather than attempt to proceed with a purchase.

Taking the facts in the light most favorable to McKinney, a genuine issue of fact exists as to whether

the associate's behavior amounted to an outright refusal to serve McKinney. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 290 (5th Cir. 2004) ("[W]hen a merchant denies service or outright refuses to engage in business with a consumer attempting to contract with the merchant, that is a violation of § 1981."). It may be that the sales associate was too burdened by her other duties and customers to notice McKinney, but after fifteen minutes in which she made no offer of assistance nor gave even the slightest word of acknowledgment, a reasonable jury could conclude that she had effectively decided not to serve him, particularly since she still made no offer of assistance when she finally approached him. A § 1981 plaintiff need not "wait indefinitely for . . . service when a reasonable person can conclude that no service is forthcoming. Indeed, in light of the clear illegality of outright refusal to serve, a [defendant] which wishes to discourage minority customers must resort to more subtle efforts to dissuade." *Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1324 (N.D. Ga. 2004). Summary judgment was therefore inappropriate.

Gregory, the Turners, and McKinney have each presented genuine issues of material fact both as to their good faith attempts to purchase merchandise at Dillard's and as to whether Dillard's obstructed or blocked their efforts to fulfill their intentions. Given that these plaintiffs are indisputably members of a protected class and given the evidence developed during discovery sufficient to show discriminatory

intent, a reasonable jury could find for the plaintiffs on all four elements of a § 1981 claim. I would therefore reverse the district court's grant of summary judgment on the § 1981 claims of Crystal Gregory, Alberta and Carla Turner, and Jefferson McKinney and remand for further proceedings.

E.

The majority cites some statistics on the prevalence and cost of shoplifting, none of which are in the record. In fact Dillard's has never argued that African American customers are, for one reason or another, more prone to shoplift or that it has evidence on which it based its discriminatory use of the security code when blacks enter the Columbia store. But more importantly, the majority fundamentally misinterprets the balance struck by the political branches. Section 1981 does not prohibit retailers from implementing non race based security measures. Rather, the statute simply requires that whatever security measures a retailer undertakes must apply equally to customers of all races.

Although it explicitly acknowledges the offense that Dillard's alleged conduct caused the plaintiffs in this case, *ante* at 17, the majority appears to conclude that § 1981 tolerates a certain level of intentional discrimination. I submit that there is no basis for such conclusions either in established case law or in the history of § 1981. We all accept that federal judges ought not upset the policy judgments of elected

officials, but the unmistakable intent of Congress cannot be ignored to "ensure that federal law prohibits *all* race discrimination in *all* phases of the contractual relationship." H.R. Rep. No. 102-40, pt. 1, at 92 (1991) (emphasis added). The legislative purpose is absolute and affords no shelter to demeaning or humiliating attempts to thwart African American customers as they attempt to exercise in good faith their right to make and enforce contracts.

The majority worries that deterring discriminatory conduct on the part of retail merchants may trigger additional litigation, including nonmeritorious claims. There is no doubt that "too broad a reading [of § 1981] would produce countless law suits based on minor or imagined discourtesies." *Garrett,* 295 F.3d at 107 (Boudin, J., concurring in part and dissenting in part). But as a practical matter, frivolous lawsuits are presently weeded out by the requirement that plaintiffs prove intentional discrimination, not that they prove a flagrant and outright refusal to deal. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375, 391, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982). The burden of proving intentional discrimination is a major impediment to prosecuting a § 1981 claim successfully. *U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) ("There will seldom be 'eyewitness' testimony as to the [defendant's] mental processes."). Yet the majority appears to hold that even when a plaintiff can provide evidence of discriminatory intent – and can therefore overcome this

traditional obstacle to pursuing a claim – her cause will still fail unless she proves an absolute refusal to deal on the part of the merchant.

The majority mischaracterizes this dissent as lacking a "limiting principle on actionable interference," *ante* at 11, for the analysis presented here is firmly grounded in the language of § 1981, its legislative history, and the established case law of the Supreme Court and of this and other circuits, including *Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006), *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), *Green v. Dillard's, Inc.,* 483 F.3d 533 (8th Cir. 2007), *Bediako v. Stein Mart, Inc.,* 354 F.3d 835 (8th Cir. 2004), *Barfield v. Commerce Bank, N.A.*, 484 F.3d 1276 (10th Cir. 2007), *Williams v. Staples,* 372 F.3d 662 (4th Cir. 2004), *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2002), *Christian v. Wal-Mart Stores, Inc.,* 252 F.3d 862 (6th Cir. 2001), *Hampton v. Dillard Department Stores,* 247 F.3d 1091 (10th Cir. 2001), *Watson v. Fraternal Order of Eagles,* 915 F.2d 235 (6th Circ. 1990), and *Hall v. Pennsylvania State Police,* 570 F.2d 86 (3d Cir. 1978). Any successful § 1981 claim is of course limited by the plaintiff's ability to produce sufficient evidence to satisfy the four critical elements of the claim, including the difficult task of proving discriminatory intent.

This case may be unique for the evidence developed in support of the plaintiffs' claims that Dillard's intentionally discriminated against African American

customers. The plaintiffs rely not only on their own experiences and impressions, but they have also uncovered testimony from former employees describing from the inside the discriminatory practices of management and personnel at the Columbia store. Such damaging testimony distinguishes these plaintiffs from those who might bring frivolous cases and strike suits in order to press nonmeritorious claims. We have here four African American plaintiffs who have produced substantial evidence of discriminatory intent, harassing treatment, and actionable interference with their intended purchases, interference which "as a whole thwarted their attempt to make and close a contract." *Green,* 483 F.3d at 539. If a retailer in these circumstances is immune from a § 1981 claim as a matter of law, then it is difficult to see what practical protection the statute is being afforded in the retail market.

III.

The § 1981 claims of the nine remaining appellants – Treva Gage, Debra Hamilton, Capria Lee, Arnel Monroe, Michael Richmond, Maren Snell, Felicia Turner, Michael Warrick, and LaShanda Wisham – were all dismissed for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). We review such dismissals de novo, *Carter v. Arkansas,* 392 F.3d 965, 968 (8th Cir. 2004), taking all facts alleged in the complaint to be true and construing the pleadings in the light most favorable to the plaintiffs. Particularly in civil rights cases the complaint should be liberally

construed. *Frey v. City of Herculaneum,* 44 F.3d 667, 671 (8th Cir. 1995). The complaint need not follow any preestablished formula since there is no "rigid pleading requirement for discrimination cases." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Rather, the "simplified notice pleading standard," *see* Fed. R. Civ. P. 8(a), requires only that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.*

These plaintiffs' amended complaint satisfies this threshold. When its allegations are read in the light most favorable to the plaintiffs' claims, they adequately state facts supporting the four elements of a viable § 1981 claim: (1) that the plaintiffs are members of a protected class, (2) that Dillard's intentionally discriminated against them, (3) that they sought to exercise their rights to make and enforce contracts with Dillard's, and (4) that Dillard's interfered with that exercise. *See Green,* 483 F.3d at 538.

The first element is uncontroversial: the complaint clearly identifies each of the plaintiffs as African American. The complaint further alleges with respect to each plaintiff that Dillard's "engaged in unlawful discriminatory practice" and "exhibited a pattern and practice of discrimination against African Americans." These allegations reasonably put Dillard's on notice that the plaintiffs intended to prove intentional discrimination against minority customers, and the complaint therefore satisfies the

second element. The complaint also alleges that each plaintiff "sought to make and enforce a contract for services ordinarily provided by Dillard's, Inc." In particular, the plaintiffs were "denied the privileges of making shopping purchases." These allegations gave notice that the plaintiffs attempted to exercise their rights to make and enforce contracts by purchasing merchandise at Dillard's. The complaint therefore satisfies the third element. Finally, the complaint alleges that each plaintiff was "deprived of services while similarly situated persons outside the protected class were not," that each plaintiff "received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory," and that Dillard's "profil[ed], follow[ed], harass[ed], and engag[ed] in other acts designed to directly or indirectly refuse or withhold services" from the plaintiffs. These allegations gave notice as to the manner in which Dillard's had arguably interfered with the plaintiffs' protected interests. The complaint therefore satisfies the fourth and final element of a § 1981 claim.

The factual allegations are "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The complaint states how, when, and where Dillard's discriminated against the plaintiffs. It alleges that during the period from 1998 until the complaint was filed in 2004, these nine appellants "were followed and/or otherwise subjected to surveillance based

upon their race" at the Dillard's store in Columbia, Missouri. The majority objects that this statement, taken alone, alleges nothing more than harmless surveillance or watchfulness. But when this particular allegation is construed in the context of the plaintiffs' other averments and viewed in the light most favorable to them, it is clear that it alleges more than "unadorned" surveillance. *See Garrett,* 295 F.3d at 101. Elsewhere in the complaint – and incorporated into each individual count by reference – the plaintiffs allege that they attempted to "mak[e] shopping purchases" but were effectively denied that privilege on account of, among other things, the defendant's "following, *harassing,* and engaging in other acts designed . . . to refuse or withhold services." (emphasis added).

Although the complaint is not as rich with detail as some might prefer, it need not be. *Twombly,* 127 S. Ct. at 1959 (holding detailed factual allegations are unnecessary). When the complaint is construed liberally, as it must be, *Frey,* 44 F.3d at 671, it clearly states that between 1998 and 2004 the plaintiffs attempted to make purchases at the Columbia Dillard's but were followed, harassed, and otherwise denied the opportunity to complete their transactions because of the defendant's alleged policy and practice of racial discrimination. That was enough to state a claim under § 1981 and to afford Dillard's adequate notice under Rule 8(a)'s simplified notice pleading standard. I would therefore reinstate the claims of

these nine appellants and remand for further proceedings.

IV.

Section 1981 was originally enacted almost 150 years ago to guarantee to African Americans the right of equal treatment during the course of negotiating, consummating, performing, and enforcing contractual duties. Its purpose was reaffirmed in 1991 when Congress explicitly overturned the Supreme Court's restrictive interpretation of the statute in *Patterson* and chose to define § 1981's coverage to include the terms and conditions under which contracts are negotiated and formed. The majority turns the settled intent of Congress on its head by holding that intentional discrimination which is demeaning or humiliating is nevertheless tolerable under § 1981 even if it thwarts the exercise of protected rights. This cannot be reconciled with the statute's plain instruction that African Americans must be guaranteed "the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (emphasis added). As the Third Circuit has noted, a commercial establishment violates § 1981 rights when it "offer[s] its services under different terms dependent on race." *Hall v. Pa. State Police*, 570 F.2d 86, 92 (3d Cir. 1978).

The extensive factual record developed during discovery revealed that store personnel at the Columbia Dillard's regularly broadcast a security code

whenever African Americans entered the store. Evidence was uncovered that the Columbia Dillard's maintained a customary practice of targeting African Americans for harassing behavior, intimidation, and sometimes outright refusals of service which thwarted, frustrated, or blocked the plaintiffs from the exercise of their § 1981 rights. *See Green,* 483 F.3d 539.[20] The summary judgment plaintiffs produced issues of material fact, and their § 1981 claims should not have been dismissed on summary judgment but tried by a fact finder. Further, each of those dismissed under Rule 12(b)(6) has alleged intentional race based discrimination which interfered with the exercise of protected contractual interests. Their allegations are to be construed liberally and were sufficient under the rule of *Twombly.* Dillard's was not entitled to judgment as a matter of law.

For these reasons I respectfully dissent.

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[20] "Thwart" is defined by a recognized dictionary as "to prevent from taking place; frustrate; block." American Heritage Dictionary 1343 (New College Ed. 1976).

Crystal Gregory; Alberta Turner; Carla Turner; Treva Gage; Debra Hamilton; Capria Lee; Antwinette Avery; Jeff McKinney; Arnel Monroe; Michael Richmond; Maren Snell; Felicia Turner; Michael Warrick; LaShanda Wisham; Cecilia Young, Plaintiffs-Appellants, v. Dillard's, Inc., Defendant-Appellee.

No. 05-3910

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

494 F.3d 694; 2007 U.S. App. LEXIS 17304

June 14, 2006, Submitted
July 20, 2007, Filed

COUNSEL: For Crystal Gregory, Alberta Turner, Carla Turner, Treva Gage, Debra Hamilton, Capria Lee, Antwinette Avery, Jeff McKinney, Arnel Monroe, Michael Richmond, Maren Snell, Felicia Turner, Michael Warrick, Lashanda Wisham, Cecilia Young, Plaintiffs-Appellants: David Gregory Brown, LATHROP & GAGE, Jefferson City, MO; Dirk L. Hubbard, KLAMANN & HUBBARD, Overland Park, KS; William D. Rotts, ROTTS & GIBBS, Columbia, MO.

For Dillard's, INC., Defendant-Appellee: Charles B. Jellinek, BRYAN & CAVE, St. Louis, MO; Lynn McCreary, Jeremiah J. Morgan, Sr., BRYAN & CAVE, Kansas City, MO.

JUDGES: Before MURPHY, MELLOY, and COLLOTON, Circuit Judges.

OPINION BY: MURPHY

OPINION

MURPHY, Circuit Judge.

Crystal Gregory and Alberta and Carla Turner initiated this action against Dillard's, Inc. under 42 U.S.C. § 1981 and the Missouri Human Rights Act (MHRA). They allege that racially discriminatory policies and practices at the Dillard's department store in Columbia, Missouri denied them the same ability to purchase merchandise and access services as enjoyed by others, in violation of their rights under federal and state law. Fourteen additional African American plaintiffs later filed similar claims under § 1981. The amended complaint seeks declaratory, injunctive, and monetary relief. Dillard's moved for summary judgment and dismissal for failure to state a claim, and the district court ruled in its favor except as to the claim of Michael Butler which later settled. The dismissed plaintiffs appeal,[1] arguing that the district court erred in its analysis and application of the law. We affirm in part and reverse in part.

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[1] Antwinette Avery and Cecilia Young subsequently withdrew from the appeal, and Deidre Golphin voluntarily dismissed her claim.

I.

A.

The original complaint was filed in April 2003 by Gregory and the Turners; it was amended one year later to add the other plaintiffs. The thirteen African American appellants are predominantly residents of Columbia or nearby communities, ranging in age from twenty to fifty seven at the time of the incidents about which they testified during discovery. The record in this case appears to be unique among the reported circuit cases dealing with § 1981 claims in the retail context in that it includes evidence not only from shoppers, but also from former Dillard's employees.

The jurisdictional statement in the amended complaint alleges that Dillard's denied plaintiffs "the privileges of making shopping purchases" and "deprived [them] of services enjoyed by non-minorities" as part of its "purposeful pattern and practice of racial discrimination with respect to African American customers." The complaint alleges further that the plaintiffs "sought to make and enforce a contract for services ordinarily provided by Dillard's" but they were denied the right to enter into a contract and were "deprived of services [available to] similarly situated persons outside the protected class," that Dillard's discriminated against them "by directly and/or indirectly refusing, withholding from or denying" them services, and that the store "frequently engages in . . . discriminatory surveillance pursuant to a

policy and practice of racial discrimination." Each of the plaintiffs dismissed under Rule 12(b)(6) was alleged to have "experienced, within the time period of 1998 to [the] present, instances at Dillard's Columbia, Missouri store in which they were followed and/or otherwise subject to surveillance based upon their race." Each individual claim incorporated all the other allegations in the complaint by reference.

In its answer Dillard's denied the allegations in the complaint and alleged a number of affirmative defenses: failure to state a claim for which relief could be granted, failure to exhaust administrative remedies, any unlawful conduct was outside the scope of employment, failure to mitigate damages, any emotional distress or mental injuries had other causes, and constitutional grounds prevent any punitive damages. Because of Dillard's successful motions for summary judgment and failure to state a claim, its other defenses were not developed before the district court.

During discovery plaintiffs sought to establish prima facie cases under federal and state law by producing evidence to support the allegations in their complaint. In recounting the evidence in the record on summary judgment, we keep in mind that the facts are to be considered in a light most favorable to the plaintiffs. *Belec v. Hayssen Mfg. Co.*, 105 F.3d 406, 408 (8th Cir. 1997). Part of that record consists of testimony from five former employees of the Columbia store. They testified that Dillard's had discriminatory polices [sic] in respect to African American

shoppers and that there was discriminatory enforcement of store policies on returns, exchanges, and shoplifting.

Tammy Benskin, a white employee in the men's fragrance department from 1997 to 1998, testified that Dillard's had an unwritten policy of closely surveilling and following black shoppers. According to Benskin the store's general security code – Code 44 – was customarily announced over the employee intercom whenever an African American came into the store. The code was almost never used when a white shopper entered. Store manager Don Edson and one of his assistants regularly followed African American shoppers closely, including frequent customers who had made substantial purchases at Dillard's. Benskin said she never saw Edson watch or follow white customers. One African American customer who had spent a great deal of money in the store became so upset by being followed that he turned on Edson and yelled, "I do not have to take this. I am here to buy clothes." Benskin stated that she was told by Dillard's employees that African American customers "steal all the time." One of the reasons she quit was because she "couldn't deal with the prejudice anymore."

Kenneth Gregory is a police sergeant for the city of Columbia who worked part time at Dillard's as a security guard during the years 1995, 1997, and 1998. He also is the husband of Crystal Gregory. While he was working at Dillard's, the store announced a zero tolerance policy for shoplifters. That policy was to prosecute shoplifters "to the full extent of the law" with no exceptions. Security personnel were told to

watch for anyone taking merchandise and to wait until the individual attempted to leave the store before making an arrest. Gregory contrasted the store's treatment of white shoplifters who were sometimes allowed to leave if they returned the stolen merchandise or paid for it with that of others who were arrested and prosecuted even though they offered to reimburse the store. On one occasion when Gregory was preparing to arrest a white shoplifter, store manager Edson intervened. Instead of following the zero tolerance policy, Edson asked the man if he had intended to pay for the merchandise. Gregory testified that on virtually every one of his shifts he saw African American shoppers being followed by Dillard's employees. He said he observed many instances where there was no other apparent reason for the surveillance than the race of the customers.

Former employees testified about discriminatory enforcement of the policy on returns. From March 2000, the Columbia store's policy on returns required customers to produce either a receipt of purchase *or* merchandise with an attached Proof of Purchase (POP) label showing it had been purchased at the Columbia store. Before that date the policy was that customers had to produce a receipt in order to return merchandise, but evidence was produced that white customers were frequently allowed to return items without a receipt.

Maren Snell worked at Dillard's in 2001 in the women's fragrance department. A black woman herself, she is also one of the appellants. In discovery she

testified that she frequently witnessed African Americans unsuccessfully attempt to return merchandise carrying POP labels. White customers were never asked to furnish receipts if they were returning merchandise carrying a POP label, but she often saw a supervisor named Tracy and other Dillard's employees refuse to accept such returns from blacks without original receipts. Tracy also told Snell not to give fragrance samples to a group of black girls in the store because "they're not going to buy anything anyway." Snell testified she herself was once followed when she went into the store off duty to shop. She frequently saw other African American shoppers being subjected to discriminatory treatment. On several occasions she was instructed by supervisors to go "watch those black kids" or to follow black shoppers.

Rick Beasley, an official with the Missouri Department of Economic Development, worked at Dillard's selling men's suits from 1996 until 1999. He observed systematic racial discrimination at Dillard's that he said was carried out by many employees. He also described seeing black customers treated differently from whites when trying to return a purchased item without a receipt. Theresa Cain worked at the Columbia store from 1999 to 2000. She reported that African American customers were "stereotyped" by Dillard's employees and that the security personnel were so focused on watching black customers that they frequently missed shoplifting offenses by whites.

The plaintiffs dismissed on summary judgment – Crystal Gregory, Alberta and Carla Turner, and Jefferson McKinney – were also deposed. Crystal Gregory, the wife of a Columbia police officer, testified that she could not remember a time at Dillard's when she was not followed by store employees. She also overheard sales people talking about how African Americans are likely to steal. Gregory was particularly upset by her experience on February 3, 2001, when she and her sister went to Dillard's to purchase a "dressy" outfit. While they were attempting to look at the merchandise in the Ralph Lauren section, an employee named Tracy came up and began to follow after them. Gregory found a pair of pants she was interested in and entered a dressing room to try them on. When she came out to show her sister how the pants looked, she found Tracy standing directly outside of the dressing room "smirking" and flanked by two security guards. This conduct offended Gregory so much that she told her sister she was not going to buy the pants she had planned to purchase. She went up to the counter and asked to speak to a manager about the whole incident. The manager on duty, a woman named Janet, did not appear to care about her complaint so Gregory left the store. She returned the next morning to complain to store manager Don Edson about the incident. Edson said he was sorry and promised to talk with Tracy and the security guards.

Alberta Turner and her daughter Carla testified that they were almost always followed when they

attempted to shop at Dillard's. Alberta complained that she was never offered assistance by the sales staff. The Turners' worst experience occurred on Memorial Day in 2002 when Alberta was shopping with Carla and her daughters. After they purchased some children's shoes, Carla and one of her daughters went to look for school clothes. They found several styles of pants they were interested in buying and went in a dressing room to try them on. When they came out, they faced both a sales associate and a security guard waiting outside the room. The sales associate stared at the bags of purchased merchandise Carla was carrying, and a security guard followed closely behind her and her child as Carla went to look for her mother. She asked the guard why he was following them. He gave her no answer and just continued to trail them. Alberta had in the meantime found merchandise she intended to purchase for her grandchildren, but she became upset when she saw the security guard trailing her daughter and grandchild. The family felt so humiliated they had to leave the store. On their way out, Alberta went up to a sales associate and told her that the store had just lost hundreds of dollars in sales. With a "weird grin" on her face, the associate responded, "So, so what?"

Jefferson McKinney is an occasional Dillard's customer. During the summer of 2000 he went to Dillard's with two of his cousins to shop for cologne. McKinney testified that he did not receive sales assistance as he waited at the cologne counter even though he made repeated eye contact with a sales

associate. The associate nevertheless helped several white customers. While McKinney and his cousins waited, they began to sample the cologne testers set out on the counter. After approximately fifteen minutes, the associate came over and moved the testers without saying anything to the men. One of McKinney's cousins asked her why they weren't being waited on, and she responded with a "kind of rude . . . tone." The cousin asked her to call a manager. When she did not, they left the store.

Since the remaining appellants were dismissed on the pleadings, our analysis as to their claims must focus on the allegations of their complaint, *see* Fed. R. Civ. P. 12(b)(6), but the discovery evidence about their experiences is nevertheless part of the record on the motions for summary judgment. *See* Fed. R. Evid. 402, 404(b). Also in the record is the experience of Michael Butler, the nondismissed plaintiff who settled with Dillard's. Butler tried to return a pair of shoes he had purchased at Dillard's. Although the shoes had a POP label attached to them, two sales associates demanded a receipt from him and made accusatory remarks such as, "[You] could have stolen those shoes. People do that all the time and bring them in and try to get . . . money back." Butler offered to go home to get his receipt, but the salespeople demanded that he leave his shoes at the store and delayed him there for approximately one hour. Eventually he was permitted to leave the store with the shoes he had brought with him and subsequently

returned with his receipt. He was then allowed to exchange the shoes for a new pair.

Almost all of the plaintiffs described being harassed or trailed by security guards or other employees while shopping at the Columbia Dillard's. Arnel Monroe and his daughter went to Dillard's to redeem a gift card she had received. Monroe described Dillard's as one of the only stores in the area that offered professional apparel. He testified that while they were shopping, he saw a Kenneth Cole shirt he was interested in and carried it with him as the two walked toward the jeans section. Although Dillard's ordinarily permits its customers to carry merchandise with them from one department to another as they select various pieces, a security guard began to follow Monroe in a manner which alarmed his daughter who asked, "Daddy, why is that guy staring at us?" Monroe did not complete the purchase of a shirt he had selected to buy because the guard's conduct angered and humiliated him in front of his child. Michael Warrick testified that while shopping for jeans with his brother, a sales associate trailed them through more than one department. After Warrick selected and tried on a pair of jeans and was leaving the fitting room, the same sales associate "bumped" him in a deliberate manner apparently intended to dislodge concealed merchandise. This extraordinary behavior angered him and kept him from returning to Dillard's for four years even though he had been able to purchase the jeans from another employee.

When Treva Gage was shopping with her children and several friends, security guards followed them all over the store even when they went to the bathroom. Gage was upset and indignant at this behavior. She expressed amazement about this treatment to her friend who responded that Dillard's personnel "always do that. . . . I hate this place." Although Gage had selected several shirts to purchase, she felt so put down by the security guards that she laid the shirts on a sales counter next to a male employee and complained that she had been followed every time she came into Dillard's. He did not offer to help her, and she left the store.

Several of the plaintiffs testified that they had been denied service. When Michael Richmond was shopping for jewelry with his mother, he told a sales associated [sic] he wanted to look at a particular item in a closed display case. Instead of showing it to him, the sales associate repeatedly emphasized the price of the item and suggested he look for merchandise at the markdown counter. Richmond felt insulted and told her in a rude way that he was not interested in the markdowns. He left the jewelry department and complained to an assistant manager who apologized for what had occurred, and he left the store. Debra Hamilton testified to a specific incident when she was shopping at Dillard's and was trailed by a security guard. After selecting a dress to purchase, she went to the sales counter to pay for it. She was ignored by the cashier who instead waited on a series of white customers who had arrived at the sales counter after

Hamilton. Hamilton finally said to the sales associate, "Well, I thought I was here first." The only response she received was, "Well, I'm sorry." Hamilton left without the dress.

B.

In October 2003 Dillard's moved to dismiss the claims of Crystal Gregory and Alberta and Carla Turner for failure to state a claim or alternatively for summary judgment. After its motion was filed, Gregory and the Turners sought leave to amend their complaint to add the claims of other plaintiffs and to assert a class action. Leave to amend was granted, and Dillard's filed a second motion to dismiss directed at the new plaintiffs and opposed the motion for class certification. The latter motion was denied in April 2004, and in January 2005 the district court dismissed most of the § 1981 claims for failure to state a claim. Seven months later the district court granted summary judgment to Dillard's on the § 1981 claims of Gregory, Alberta and Carla Turner, and Jefferson McKinney as well as the MHRA claims of Gregory and the Turners. The district court denied summary judgment in respect to Michael Butler's § 1981 claim; the parties later settled his claim.

In analyzing the plaintiffs' § 1981 claims, the district court stated it was applying the test for a prima facie case of discrimination approved in *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004), and *Youngblood v. Hy-Vee Food Stores,*

Inc., 266 F.3d 851, 854 (8th Cir. 2001). To establish a prima facie case a plaintiff must show (1) membership in a protected class, (2) discriminatory intent on the part of the defendant, (3) engagement in a protected activity, and (4) interference with that activity by the defendant. *Bediako,* 354 F.3d at 839.[2] It is not contested that appellants are members of a protected class.

In its order dismissing most of the plaintiffs' claims under Fed. R. Civ. P. 12(b)(6), the district court focused on the fourth factor in the prima facie test – actionable interference. It required that a plaintiff plead "per se interference" with a protected activity in order to state a § 1981 claim. The district court did not define the term but observed that plaintiffs had not alleged they had been "questioned, searched, detained, or subjected to physical activity other than being followed or subjected to surveillance." In support of its per se interference test the court quoted a paragraph from *Garrett v. Tandy Corp.*, 295 F.3d 94, 101 (1st Cir. 2002), which rejected "unadorned" surveillance as a basis for § 1981 liability but only "[s]o long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases." *Id.* Concluding that racially based surveillance was not per se interference with

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[2] *Bediako* classified these components in three parts, combining the third and fourth factors listed above. We discuss these factors separately in order to sharpen the focus of the analysis.

plaintiffs' ability to contract, the district court dismissed all claims alleged by Monroe, Richmond, Hamilton, Gage, Warrick, Wisham, Felicia Turner, Snell, Lee, Butler, Deidre Golphin, and Cecilia Young, except for the "check writing and returns/exchanges" claims of Butler, Golphin, and Young.[3]

In its summary judgment order the district court applied a similar analysis to the claims of Gregory and the Turners. It concluded that all except one of their claims were based on discriminatory surveillance.[4] The court stated that such a theory was not actionable, citing *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1108 (10th Cir. 2001) ("[D]iscriminatory surveillance . . . on its own [is] not actionable under § 1981. . . ."). The court further concluded that Jeff McKinney and Cecilia Young also failed to establish prima facie cases: McKinney had not attempted to purchase cologne and Young's check had been rejected by an outside company. The several MHRA claims were also dismissed because of the court's

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[3] The record reflects that Butler settled his claims and that Golphin voluntarily dismissed hers. Summary judgment was later entered against Young who has withdrawn her appeal.

[4] The district court recognized only one nonsurveillance claim in Gregory's evidence, involving the removal of a security tag on an item she had previously purchased. This claim was dismissed on the ground that she was not at Dillard's to buy anything on the day the tag was removed and thus had no contractual interest. Gregory has not addressed this incident on her appeal.

conclusion that Dillard's is not a place of public accommodation under state law.

Appellants contend that the district court erred in dismissing their claims under § 1981 and the MHRA. They argue that Gregory, the Turners, and McKinney produced sufficient evidence to withstand summary judgment and that the allegations by the other appellants of violations of § 1981 were sufficient to survive the motion to dismiss. Appellants claim they were subjected to a "systemic race-based surveillance and denial of service scheme" and argue that the district court erred in its ruling that Dillard's is not a place of public accommodation under Missouri law.

Dillard's responds that the district court's holding with respect to the scope of the appellants' rights under § 1981 was correct. Appellants have only alleged or shown a possible loss of prospective contract interests says Dillard's, not the loss of an actual contract interest. The summary judgment plaintiffs were never denied entry into Dillard's, prevented from moving within the store or questioned, detained, or asked to leave. Dillard's also argues that the plaintiffs failed to show discriminatory intent and that the district court was correct in concluding that Dillard's is not a place of public accommodation under the MHRA.

II.

A.

Section 1981(a) provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." This language was originally enacted in 1866 and then reenacted as part of the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which the Supreme Court has called a "legislative cousin[ ]" to the Fourteenth Amendment since it was passed to help enforce its protections against racial discrimination. *Gen. Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982).

Congress responded to more restrictive interpretations of § 1981 by enacting the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991 Act). Included in the 1991 Act was a broad definition of the equal right to make and to enforce contracts. Under § 1981(b), that right includes "the *making,* performance, modification, and termination *of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" *Id.* (emphasis added). The 1991 Act was explicitly intended to "provide adequate protection to victims of discrimination." § 3(4), 105 Stat. at 1071; *see also* H.R. Rep. No. 102-40(II), at 2 (1991) ("By restoring the broad scope of Section 1981, Congress will ensure that all Americans may not be *harassed,* fired, or otherwise discriminated against in contracts because

of their race." (emphasis added)). The Supreme Court has since recognized that in light of the 1991 Act's addition of § 1981(b), "[the] prohibition against racial discrimination in the making and enforcement of contracts applies *to all phases and incidents of the contractual relationship.*" *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) (emphasis added).

The Supreme Court has never addressed the applicability of § 1981 in the specific context of retail transactions, but even before the 1991 amendments it made it clear that the statute reaches all types of private contracting and the process of contract formation. *See Runyon v. McCrary,* 427 U.S. 160, 168, 172, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) ("classic violation" of § 1981 when parents seeking "to enter into contractual relationships" for their children's education were rejected because of race); *see also Johnson v. Ry. Express Agency, Inc.,* 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975) (private employment). The Court reached a similar conclusion in *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 439-40, 93 S. Ct. 1090, 35 L. Ed. 2d 403 (1973), when it held that an African American woman who had been denied guest admittance to a private swimming pool might also have a claim under § 1981. *See also Patterson v. McLean Credit Union,* 491 U.S. 164, 176-77, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (§ 1981 reached discrimination in contract formation during hiring process).

B.

Although no § 1981 case arising in retail stores has yet reached the Supreme Court, many have come before the circuit courts which have developed standards for analyzing them. Section 1981 "does not provide a general cause of action for race discrimination," *Youngblood,* 266 F.3d at 855, but specifically protects the equal right "to make and enforce contracts" regardless of race. 42 U.S.C. § 1981(a). Congress passed the 1991 Act to ensure that § 1981 reach all "phases and incidents of the contractual relationship," *Rivers,* 511 U.S. at 302, and the statute extends "beyond the four corners" of a particular contract. *Garrett,* 295 F.3d at 100, *quoted in Green,* 483 F.3d at 538. Some courts have broadly defined protected activity as that which is "enumerated" in the statute itself. *Rutstein v. Avis Rent-A-Car Sys., Inc.,* 211 F.3d 1228, 1235 (11th Cir. 2000); *Bellows v. Amoco Oil Co.,* 118 F.3d 268, 274 (5th Cir. 1997); *Morris v. Office Max, Inc.,* 89 F.3d 411, 413 (7th Cir. 1996); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1087 (2d Cir. 1993).

Under Eighth Circuit precedent, appellants had the burden to plead and then show that Dillard's had discriminatory intent, that they were engaging in activity protected by § 1981, and that Dillard's interfered with that activity. *Green v. Dillard's, Inc.,* 483 F.3d 533, 538 (8th Cir. 2007); *Bediako,* 354 F.3d at 839. Their membership in a protected class is undisputed. Section 1981 protects the right of black shoppers "to the same benefits and privileges of

contractual relationships as white shoppers." *Green,* 438 [sic] [483] F.3d at 539.

Under § 1981 circumstantial as well as direct evidence can establish a prima facie showing of race based discriminatory intent. *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1059 (8th Cir. 1997). Direct evidence of discriminatory intent will rarely be available, for "there will seldom be 'eyewitness' testimony" regarding a defendant's mental processes. *Id.* (internal quotations omitted). Evidence of systemic discriminatory practices can be highly relevant in establishing animus toward nonwhites. *White v. Honeywell, Inc.,* 141 F.3d 1270, 1276 (8th Cir. 1998); *Hawkins v. Hennepin Technical Ctr.,* 900 F.2d 153, 155-56 (8th Cir. 1990). Discriminatory intent may also be evidenced by racial insults, *Green,* 438 [sic] [483] F.3d at 540, or evidence that a retailer has discriminatory policies and practices. *Cf. id.* Another way of showing discriminatory intent is by evidence that similarly situated white shoppers were treated differently than black shoppers. *See, e.g., Barfield v. Commerce Bank, N.A.,* 484 F.3d 1276, 1279 (10th Cir. 2007); *Lizardo v. Denny's, Inc.,* 270 F.3d 94, 101 (2d Cir. 2001).

Plaintiffs must show that they had a protected contractual relationship or interest. *Daniels v. Dillard's, Inc.,* 373 F.3d 885, 887 (8th Cir. 2004), *citing Bediako,* 354 F.3d at 839; *Youngblood,* 266 F.3d at 854. A contract interest is created by an "intent to purchase." *Green,* 438 [sic] [483] F.3d at 539. Mere presence on a store's premises with no indication of a desire to contract is insufficient to show a contractual

interest under § 1981. *See Hampton,* 247 F.3d at 1104; *see also Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 752-53 (5th Cir. 2001); *Office Max,* 89 F.3d at 414. The retailer's display of goods serves as an offer which a customer considers by taking the goods off the rack or shelves, *Garrett,* 295 F.3d at 100, and then accepts by completing a purchase transaction with the cashier. *See Green,* 438 [sic] [483] F.3d at 539. The protections of § 1981 are "triggered once a customer has made 'some tangible attempt to contract' by selecting particular items" offered by the retailer. *Id.* at 538-39, *quoting Morris,* 277 F.3d at 752. For a prima facie case plaintiffs must show that they "actively sought to enter into a contract with the retailer." *Green,* 483 F.3d at 538; *see also Williams v. Staples, Inc.*, 372 F.3d 662, 667-68 (4th Cir. 2004); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001).

It is instructive to examine the factual circumstances in which courts have decided whether African American shoppers had a sufficient contract interest to make out a prima facie § 1981 claim. The plaintiffs in *Green* selected a particular wristwatch locked in a display case and told a sales associate they wished to purchase it. *See* 483 F.3d at 538-39. The plaintiff in *Christian* "made herself available to enter into a contractual relationship" by selecting items and placing them in her cart as she shopped. *See* 252 F.3d at 874. The plaintiff in *Williams* whose out of state check was not accepted had made out a sufficient contract interest by presenting the check to pay for his purchase. 372 F.3d at 668. Although the plaintiff in

Garrett had an interest in forming a contract while he was in the store shopping, 295 F.3d at 101, his contractual relationship with the retailer ended when his purchase was complete. *Id.* at 102; *see also Youngblood,* 266 F.3d at 854-55. The contracting process continues, however, when a shopper wants to purchase another item, *see Green,* 483 F.3d at 538-39, or retains some residual entitlement to another benefit resulting from her purchase. *See Hampton,* 247 F.3d at 1104-05 (purchase created additional contract interest in right to free perfume sample).

The final element plaintiffs must establish under § 1981 is actionable interference by the defendant with their contractual interest. *Green,* 483 F.3d at 538; *Daniels,* 373 F.3d at 887; *Bediako,* 354 F.3d at 839. They must produce evidence of conduct, policies, or practices which "a trier of fact could find as a whole thwarted their attempt to make and close a contract" with the defendant. *Id.* at 539. Our court has recognized that "den[ying] a benefit of the contractual relationship" is actionable interference under § 1981. *Youngblood,* 266 F.3d at 854.[5]

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[5] The dissent's proposal to import into the retail context the "severe and pervasive" test used in employment discrimination cases would be a drastic departure from the law of this circuit and others; it also overlooks significant differences between the settings. Discriminatory retail harassment thwarts the *formation* of a contract while discriminatory harassment on the job *alters the terms* of an already formed contract. The employment relationship is a continuing one affecting the work environment and the severe and pervasive test arose out of that setting.

Actual interference has been found in varying circumstances, for § 1981 claims "call for careful line-drawing, case by case." *Garrett,* 295 F.3d at 101. *Hampton*, for example, held that a security guard's "interruption" of the plaintiff's attempt to redeem a coupon was "an actual loss" of the plaintiff's contractual privilege even though the transaction had not been made impossible. 247 F.3d at 1106. Refusal to accept a check was considered actionable interference in *Williams,* 372 F.3d at 668, as were discriminatory accusations of shoplifting and being ejected from the premises in *Christian.* 252 F.3d at 874. Refusal to wait on black customers, interference with another salesperson's assistance, and racially offensive comments created genuine issues of fact as to actionable interference in *Green*. *See* 483 F.3d at 539. The deliberate provision of inferior service to black patrons has also been held to establish actionable interference. *See Solomon v. Waffle House, Inc.,* 365 F. Supp. 2d 1312, 1324-25 (N.D. Ga. 2004); *McCaleb v. Pizza Hut of Am., Inc.,* 28 F. Supp. 2d 1043, 1048 (N.D. Ill. 1998).

Although § 1981 does not guarantee "an enjoyable shopping experience," it does prohibit racially discriminatory actions which taken as a whole thwart a shopper from closing a contract for merchandise. *Green,* 483 F.3d at 539. Thus, when a plaintiff adduces evidence from which a trier of fact could reasonably find that a retailer prevented the shopper from purchasing merchandise or receiving services offered to other customers, a prima facie claim of

actionable interference has been made. *See Barfield,* 484 F.3d at 1278 (citing cases).

C.

The claims of Crystal Gregory, Alberta and Carla Turner, and Jefferson McKinney were all dismissed on summary judgment. We review the district court's decision to grant summary judgment de novo, *Ihnen v. United States,* 272 F.3d 577, 579 (8th Cir. 2001), viewing the evidence in the record in a light most favorable to the appellants as the nonmoving parties, *Clark v. Kellogg Co.,* 205 F.3d 1079, 1082 (8th Cir. 2000). This review must be especially careful in discrimination cases. *See Heaser v. Toro Co.,* 247 F.3d 826, 830 (8th Cir. 2001).

On their appeal these plaintiffs contend that the district court erred in granting summary judgment to Dillard's because they presented evidence that they were each subjected to a "race-based surveillance and denial of service scheme" which deprived them of their equal right to make and enforce contracts. Dillard's argues that appellants failed to produce sufficient evidence that the conduct about which they complain was motivated by race or that it interfered with any contracting right of theirs. Dillard's further asserts that appellants voluntarily left the store without pursuing purchases and that the testimony of its former employees should be discounted since they did not testify about the particular experiences of the appellants.

Although the ultimate issue is whether Dillard's intentionally discriminated against the individual appellants, it would be wrong to "conflate the prima facie case with the ultimate issue of discrimination." *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994). Direct evidence is not necessary to establish a prima facie case of discriminatory intent, *Kim*, 123 F.3d at 1059, and summary judgment is improper if plaintiffs have produced evidence "establish[ing] facts adequate to permit an inference of discrimination." *Williams*, 14 F.3d at 1308. Here, appellants have produced evidence of systemic practices from which discriminatory intent can be inferred.

There is substantial circumstantial evidence that the experiences of these appellants were part of a wider set of discriminatory practices at Dillard's which targeted African Americans. The deposition evidence offered by appellants includes not only their own testimony but also that of former Dillard's employees, Michael Butler, and the group of plaintiffs dismissed under Rule 12(b)(6). In their depositions former employees testified that although Dillard's adopted formally nondiscriminatory policies, it had practices which treated African American shoppers differently than whites. Code 44 was announced over the intercom when they entered the store, they were routinely followed as they attempted to shop, and they were denied services commonly afforded to white customers such as free fragrance samples or the ability to return POP merchandise without a receipt. *Cf. Lizardo*, 270 F.3d at 101, 104 (minimal evidence

that white plaintiffs treated more favorably). This evidence shows not just incivility on the part of Dillard's employees, but harassing conduct, close and continuous trailing of black customers even up to the bathroom, discriminatory practices in returns and exchanges, failure to wait on black customers, and disparate enforcement of the policy on suspected shoplifters.

When all of this evidence is taken in a light most favorable to these appellants, as it must be on review of summary judgment, *Clark,* 205 F.3d at 1082, it is sufficient to create an inference of discriminatory intent on the part of Dillard's. *See Hampton,* 247 F.3d at 1107 (general evidence of discriminatory surveillance and higher detention rates for African American shoppers was sufficient indirect proof of discriminatory intent); *cf. Daniels,* 373 F.3d at 887-88 (8th Cir. 2004) (no showing of discriminatory intent where check rejected due to computer error and discount complaint was unsupported).

Although Dillard's argues that appellants have shown at most a "possible . . . future contract opportunity," citing *Office Max,* 89 F.3d at 414-15, the evidence presented by Gregory and the Turners is about specific items they intended to purchase but for the actions of Dillard's employees. In contrast to the *Youngblood* plaintiff, who left the store after completing his transaction, these appellants produced evidence that they departed only because they had been thwarted in attempting to make a purchase and close a contract. Plaintiffs are required only to show

that the defendant thwarted their ability to contract, not that the defendant forcibly expelled them. *See Green,* 483 F.3d at 539; *Hampton,* 247 F.3d at 1106; *McCaleb,* 28 F. Supp. 2d at 1047. The fact that a frustrated shopper has voluntarily left a retailer's premises is not dispositive in itself, for the issue is what caused the shopper to leave. *See Green,* 483 F.3d at 539. If the individual can show the retailer denied services or thwarted the attempt to contract, a prima facie claim can be made regardless of whether the retailer ejected the shopper. *See also Solomon,* 365 F. Supp. 2d at 1324.

The record taken in a light most favorable to Gregory and the Turners shows that they had selected or otherwise expressed interest in specific merchandise they intended to buy. Gregory and the Turners testified about the merchandise they had selected to purchase and had in hand. They thus made a "'tangible attempt to contract'" with Dillard's, *Green,* 483 F.3d at 538, *quoting Morris,* 277 F.3d at 752, and have made a sufficient showing of a protected interest to withstand summary judgment on that issue.

The final element in the prima facie case is actionable interference by Dillard's. The district court's test for this element was whether there was a "per se interference" with a contract interest, but such a test has not been used in our circuit or elsewhere. *Cf. Green,* 483 F.3d at 539; *Garrett,* 295

F.3d at 101;[6] *Youngblood*, 266 F.3d at 854; *Christian*, 252 F.3d at 872; *Hampton*, 247 F.3d at 1106. The proper test is whether Dillard's thwarted the plaintiffs' attempts to contract – to purchase goods or obtain services offered to other customers. *Green*, 483 F.3d at 539. The district court's interpretation of the statute was simply too narrow. As the Fourth Circuit has pointed out, in enacting § 1981 "[t]he Reconstruction Congress wrote broadly," and "we [must] give[ ] effect to that breadth." *Denny*, 456 F.3d at 437 (Wilkinson, J.). We must also give effect to the expanded scope which Congress mandated when it passed § 1981(b) and swept all "phases and incidents" of contracting within the reach of the statute. *See Rivers*, 511 U.S. at 302.

Actionable interference may occur in different ways as evidenced by the cases and provided by the statute itself. Denying any "benefit of the contractual relationship" is actionable interference. *Youngblood*, 266 F.3d at 854. Harassment and racial slurs created a genuine issue of fact on interference in *Green*, 483 F.3d at 539; *see also* H.R. Rep. No. 102-40(II), at 2 (among the goals of 1991 amendments was prevention of race based harassment of persons attempting to contract), a refusal to take a check satisfied the

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[6] The paragraph quoted by the district court from *Garrett* distinguished "unadorned" surveillance from actionable surveillance which "crosses the line into harassment [or] impairs a shopper's ability to make and complete purchases." 295 F.3d at 101.

interference element in *Williams,* 372 F.3d at 668, and interruption of the plaintiff's attempt to redeem a Dillard's coupon was actionable interference in *Hampton,* 247 F.3d at 1106. Discriminatory treatment that gives "a clear message" that black customers are not welcome is actionable even though customers are not "expressly told" to leave the premises. *McCaleb,* 28 F. Supp. 2d at 1047.

Crystal Gregory and her sister were followed by employee Tracy from the time they reached the Ralph Lauren section at Dillard's up to the fitting room where Crystal wanted to try on the merchandise she was interested in. When she came out with the pants she had selected, Tracy was waiting with two security guards and a smirking expression on her face. Gregory was so offended that she decided not to buy the pants she had intended to purchase. When she went to the manager on duty to complain, she received no offer of assistance and left the store. A trier of fact could find from this evidence that the reason Gregory departed was because her attempt to purchase the pants had been thwarted and interfered with by Dillard's employees, including a manager.

After Carla Turner and her daughter left their fitting rooms, they found a sales associate with a security guard standing right outside, apparently waiting for them. The security guard then closely followed them as they went to find Carla's mother. Carla asked the guard why he was following them but he gave no answer. When Alberta saw the guard trailing Carla and her grandchild, she became upset.

The family felt so humiliated they had to leave the store, but first Alberta complained about their treatment to a sales associate. The only response of the Dillard's employee was to ask, "So, so what?" with a "weird grin" on her face and without attempting to help the Turners complete their transactions. A factfinder could reasonably determine that these actions were hostile enough to thwart Gregory and the Turners from completing a contract of sale.

Taking the record in the light most favorable to Gregory and the Turners, we conclude that they have raised genuine issues of fact about whether Dillard's interfered with or thwarted their attempts to contract. Gregory and the Turners have produced evidence to make a prima facie showing that discriminatory conduct prevented them from completing their retail transactions. They described not merely being watched, but being treated in a demeaning and humiliating fashion by Dillard's sales associates and uniformed security guards. From the corroborative evidence in deposition testimony by former employees and the other plaintiffs, it could reasonably be inferred that the experiences of Gregory and the Turners were not isolated incidents, but part of a larger pattern of race based harassment and denial of services at the Columbia Dillard's. Michael Richmond and Debra Hamilton testified for example that they were denied service, Michael Warrick described being deliberately "bumped" by Dillard's personnel, and Michael Butler was thwarted in trying to exchange

shoes and detained while white customers were allowed to return items without a receipt.

Appellant McKinney was also dismissed on summary judgment. McKinney and his cousins had sampled cologne testers while waiting for sales assistance. Although McKinney believed he had previously made eye contact with the sales associate who subsequently moved the cologne testers, there is no evidence that McKinney ever communicated a desire to make a purchase as opposed to testing samples, *cf. Green,* 483 F.3d at 538-39, spoke to the sales associate about any merchandise when she came to the counter where he and his cousins were standing, or had more than a "general interest" in the cologne. *Office Max,* 89 F.3d at 414. We conclude that McKinney did not make out a prima facie showing of interference with a protected contract interest and that the district court did not err in granting summary judgment to Dillard's on his claim. This part of the district court judgment should be affirmed.

Evidence of discriminatory policies or practices may give rise to an inference of intentional discrimination by a defendant. *See Williams,* 14 F.3d at 1308. Evidence of racially discriminatory intent on the part of employees in their interaction with customers may also lead to liability for retailers. *See Green,* 483 F.3d at 541 (possible negligence or recklessness in hiring, retaining, and training). Here, plaintiffs have produced evidence that Dillard's has a systemic practice of surveilling and following African American shoppers, that it prosecutes African American shoplifters

more than white shoplifters, that it specifically instructs employees to follow African American shoppers and employs Code 44 to warn of their entry into the store, that it discriminates in giving fragrance samples and enforcing its policy on return of merchandise, and that it selectively withholds service from black customers.

Appellants have produced evidence to show discriminatory intent on the part of managers or supervisors and other evidence from which inference of discriminatory intent on the part of Dillard's may be drawn. Examples of this evidence include store manager Edson's intervention to prevent arrest of a white shoplifter contrary to the zero tolerance policy, a supervisor's instructions to watch "black kids" and not give fragrance samples to blacks, and routine announcement of Code 44 upon the entrance of an African American into the store. Former employee Tammy Benskin testified that managers closely surveilled blacks but never whites, was told that black customers "steal all the time," and quit her job partly because of the racial prejudice she witnessed. Rick Beasley, a state official who had worked at the Columbia Dillard's, testified that racial discrimination there was systematic. This evidence is sufficient to create a genuine issue of fact on whether Dillard's had discriminatory security and customer service policies and whether the specific actions complained of by appellants resulted from these policies.

On the record before us we conclude that summary judgment should not have been granted to

Dillard's on the § 1981 claims of Gregory and the Turners because they established prima facie cases of discriminatory intent and interference with protected activity. The judgment against them should be reversed and their § 1981 claims remanded for further proceedings, but the judgment against McKinney should be affirmed because he failed to establish a prima facie case.

D.

We turn next to the claims which were dismissed for failure to state a claim on which relief could be granted – the claims of Monroe, Richmond, Hamilton, Gage, Warrick, Wisham, Felicia Turner, Snell, and Lee. The grant of a motion to dismiss is reviewed de novo, *Carter v. Arkansas,* 392 F.3d 965, 968 (8th Cir. 2004), taking all facts alleged in the complaint to be true and construing the pleadings in the light most favorable to the plaintiffs. Particularly in civil rights actions the complaint should be liberally construed. *Frey v. City of Herculaneum,* 44 F.3d 667, 671 (8th Cir. 1995). Appellants argue that the district court applied an inappropriately narrow legal standard to the allegations in the complaint (per se interference), that their allegations were sufficient under the rules, and that their claims should not have been dismissed. Dillard's contends that the amended complaint is conclusory and failed to allege facts sufficient to show discriminatory intent or denial of a contract right.

The amended complaint alleges that Dillard's "frequently engages in intentionally racially discriminatory surveillance pursuant to a policy and practice of racial discrimination, heightened scrutiny of African-American customers, and racial profiling." These allegations are sufficient to satisfy the intent element of a prima facie case under § 1981, and direct proof of discriminatory intent is not required. *See Kim,* 123 F.3d at 1059. The amended complaint alleges that each plaintiff "sought to make and enforce a contract for services ordinarily provided by Dillard's," and that the ability to make and close contracts was thwarted by the denial of services, such as "the privileges of making shopping purchases," which were provided to similarly situated white customers, or the provision of services "in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory," such as "intentionally racially discriminatory surveillance."

Great precision is not required of the pleadings. *See Smith v. Ouachita Technical Coll.,* 337 F.3d 1079, 1080 (8th Cir. 2003). The allegations in the complaint need not track the precise wording of a § 1981 prima facie case because there is not "a rigid pleading requirement for discrimination cases." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (Title VII case). The "simplified notice pleading standard" under Fed. R. Civ. P. 8(a) requires only a statement that "'give[s] the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests.'" *Id., quoting Conley v.*

Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

The amended complaint satisfies that notice requirement, for when its allegations are construed in the light most favorable to appellants, as they must be, *Frey,* 44 F.3d at 671, they show that appellants have alleged facts constituting the elements of a prima facie case under § 1981: that appellants are African Americans, that they shopped for and selected particular items of merchandise, that they attempted to obtain services offered to others, that as African Americans they were subject to race based surveillance, and that Dillard's failed to provide them equal services and thwarted their attempts to contract.

The factual allegations in the complaint are "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). The complaint states how, when, and where they were discriminated against. The complaint alleges that after 1998 these appellants were "followed and/or otherwise subjected to surveillance based upon their race" at the Columbia Dillard's store. A plaintiff alleging that a retailer followed and otherwise subjected him to surveillance based on his race may be able to prove facts entitling him to relief under § 1981. The law forbids discriminatory harassment, *see Green,* 483 F.3d at 539; *Garrett,* 295 F.3d at 101; *see also* H.R. Rep. No. 102-40(II), at 2, so long as the plaintiff has a

contractual interest. *See Hampton,* 247 F.3d at 1118. Finally, the complaint's allegation of "a policy and practice of racial discrimination" is sufficient to give Dillard's notice that plaintiffs seek to hold Dillard's directly liable under § 1981. We conclude that the pleadings, while not particularly detailed, were nevertheless sufficient as a matter of law and that the claims should not have been dismissed under Rule 12(b)(6).

The issue on appeal for the Rule 12(b)(6) dismissals is only whether their complaint stated a claim upon which relief could be granted, *see also* Fed. R. Civ. P. 8(a), and we conclude that the pleadings did so. The claims should therefore be reinstated and remanded for further proceedings.

III.

Lastly we address the dismissal of the MHRA claims of Gregory and Alberta and Carla Turner on Dillard's motion for summary judgment. The district court concluded that the Missouri statute banning discrimination in public accommodations did not cover retail establishments like Dillard's. Gregory and the Turners protest that Dillard's fits within the MHRA's definition of public accommodation and that the district court erred in dismissing these claims. Dillard's responds that the district court correctly concluded that the MHRA does not apply to Dillard's because retail establishments are not one of the

examples which follow the statute's definition of public accommodation.

The MHRA prohibits discrimination on the basis of race in "any place of public accommodation." Mo. Rev. Stat. § 213.065(2). Places of public accommodation are defined within the statute as:

> all places or *businesses offering or holding out to the general public, goods, services,* privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public or such public places providing food, shelter, recreation and amusement, *including, but not limited to*: . . . .

Id. § 213.010(15) (emphasis added). After this general definition, the legislature listed some examples of places covered by the law; retailers were not mentioned. *Id.* § 213.010(15)(a)-(f).

Noting that no Missouri court had decided whether the MHRA covers retail stores, the district court looked to the federal civil rights law on public accommodations for guidance. Since the wording of several of the examples in the MHRA, including places selling food for "consumption on the premises," was borrowed from Title II of the Civil Rights Act of 1964, the district court relied on cases such as *Priddy v. Shopko Corp.*, 918 F. Supp. 358, 359 (D. Utah 1995) (holding that a retail establishment is not a place of public accommodation under Title II), to conclude that the MHRA does not cover retailers. Gregory and

the Turners contend that this was misguided since the MHRA differs significantly from Title II.

The MHRA contains a broadly phrased definition of public accommodation and examples which are illustrative, rather than exclusive. In contrast, public accommodations under Title II are those which fit within five categories of covered establishments. Retailers do not fall within those categories. The listed categories are not just examples, for the federal statute applies only to them. Congress thus provided "a comprehensive list of establishments that qualify as a 'place of public accommodation,' and in so doing exclude[d] from its coverage those categories of establishments not listed." *Denny,* 456 F.3d at 431 (citation omitted).

The Missouri legislature approached the coverage issue from the opposite direction taken by Congress. The MHRA has a general definition of public accommodation followed by illustrative examples. It specifically provides that the term public accommodation is not limited to those examples. Although Missouri courts may look for guidance to similar federal civil rights statutes and case law in deciding cases of first impression under the MHRA, *see Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 168 (Mo. Ct. App. 1999), they also examine any differences between the statutes. *See Wentz v. Indus. Automation*, 847 S.W.2d 877, 879 (Mo. Ct. App. 1992), *overruled on other grounds by State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003). The Missouri Supreme Court has also pointed out that the

MHRA extends its protections further than the Civil Rights Act of 1964. *See Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 624-25 (Mo. 1995) (noting the broader language of another provision in the MHRA).

In addition to its very broad definition of public accommodations the MHRA contains a nonexhaustive list of examples. We conclude that because of the significant differences between the state and federal statutes, Title II cases are not controlling on the issue of whether Dillard's is a public accommodation.

Under the MHRA, public accommodations are "*all* places or businesses" offering "goods [and] services" for the general public's "peace, comfort, health, welfare and safety." It is not contested that Dillard's offers goods, services, and facilities for the benefit of the general public. The Missouri statutory language in the general definition of public accommodations easily encompasses retail stores such as Dillard's. The wording of the MHRA's definition of public accommodation is broader than the specific examples which follow it, and more entities would fit within the general definition than the listed examples. Reading the statute to include retail establishments is also consistent with Missouri precedent which emphasizes that a remedial statute should be interpreted liberally. *See Red Dragon Rest.*, 991 S.W.2d at 167, *quoting Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. 1998).

Dillard's argues that interpreting the MHRA to cover retailers would convert the statutory examples of covered establishments into surplusage, but this argument ignores the introductory words "including, but not limited to." When a list is introduced with the term "including," it is generally interpreted as enumerating "illustrative application[s]," not as constituting an "all-embracing definition." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S. Ct. 1, 86 L. Ed. 65 (1941). It is rather Dillard's interpretation which would create surplusage in the statute, because it gives no effect to the language "including, but not limited to." *See Hadlock v. Dir. of Revenue*, 860 S.W.2d 335, 337 (Mo. 1993) ("[E]ach word, clause, sentence and section of a statute should be given meaning."). Dillard's interpretation also disregards and gives no effect to the Missouri statutory definition of public accommodations which uses language broad enough to cover Dillard's.

For these reasons we conclude that Dillard's is a place of public accommodation under Missouri law and that the MHRA claims of Gregory and the Turners should not have been dismissed for lack of coverage.

IV.

On this appeal the fundamental questions are whether or not the district court erred in granting summary judgment to Dillard's on four of the appellants' claims or erred in dismissing the remainder for

failure to state a claim. The record has not been developed on the other affirmative defenses alleged by Dillard's in its answer, the district court did not have occasion to address them, and they are not before us at this point. We conclude here only that Gregory and the Turners have produced enough evidence to show prima facie cases, that McKinney did not, and that the pleadings of the other appellants were sufficient to state a claim.

The record in this case includes evidence from both former employees and frustrated shoppers about racially discriminatory policies and practices at Dillard's that thwarted appellants' attempts to contract. Appellants alleged and produced evidence to show that Dillard's denied African American shoppers privileges and services enjoyed by other customers including the same ability to make purchases. In its Rule 12(b)(6) determination the district court failed to consider all of the allegations in the complaint including those incorporated by reference, and on summary judgment it failed to consider the full record with all of its corroborating evidence. That evidence includes testimony about harassing surveillance at Dillard's; instructions to employees to follow black shoppers; use of Code 44 to notify employees when blacks enter the store; discriminatory policies and practices in respect to merchandise returns, provision of fragrance samples, and prosecution of shoplifters; withholding of services; and discrimination by employees in managerial positions.

In sum, we affirm the judgment of the district court in favor of Dillard's on Jeff McKinney's claim, but we conclude that the district court erred in granting summary judgment on the § 1981 and MHRA claims of Crystal Gregory and Alberta and Carla Turner and in dismissing the other § 1981 claims under Fed. R. Civ. P. 12(b)(6). We therefore reverse the judgment on those claims and remand them for further proceedings not inconsistent with this opinion.

CONCUR BY: COLLOTON (In Part)

DISSENT BY: COLLOTON (In Part)

DISSENT

COLLOTON, Circuit Judge, concurring in part and dissenting in part.

The principal question presented on this appeal is whether alleged discriminatory surveillance by a retail merchant, in which members of a particular racial group are watched more closely than others while shopping, constitutes a violation of the rights guaranteed by 42 U.S.C. § 1981. The issue is not whether such conduct by a merchant is condemnable or unlawful under some other civil rights statute, but whether the district court properly applied the specific provisions of § 1981 to the record in this case. The majority opinion, in my view, deviates from the prevailing view of the federal courts that have applied § 1981 to the retail shopping environment.

The district court, hewing to that body of precedent, concluded that the claims of the thirteen appellants in this case should be dismissed, while the claim of one plaintiff, who later settled with Dillard's, presented a genuine issue of fact for trial. Because I believe the district court's approach represents a better application of the statute and is more harmonious with the present state of the law, I respectfully dissent from that part of the majority's decision that reverses the judgment of the district court.

I.

Section 1981 provides that all persons shall have the same right "to make and enforce contracts." The version of this statute enacted in 1874 did not apply to conduct, such as racial harassment, that occurred after the formation of a contract and did not interfere with the right to enforce established contract rights through legal process. *Patterson v. McLean Credit Union,* 491 U.S. 164, 175-85, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). In 1991, Congress amended the statute to broaden its scope by defining the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Since then, the courts of appeals have recognized that § 1981 prohibits racial harassment that affects the performance of a contract or the enjoyment of the benefits, privileges, terms, and conditions of a contractual relationship. *See, e.g.,*

Elmahdi v. Marriott Hotel Services, Inc., 339 F.3d 645, 652 (8th Cir. 2003); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000); *Witt v. Roadway Express*, 136 F.3d 1424, 1432 (10th Cir. 1998). It is also clear that § 1981 applies to discrimination that "blocks the creation of a contractual relationship" that does not yet exist. *Domino's Pizza v. McDonald*, 546 U.S. 470, 476, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006).

The court accurately states the elements of a § 1981 claim as including (1) membership in a protected class, (2) discriminatory intent by the defendant, (3) engagement in protected activity, and (4) interference with that activity by the defendant. *See Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004). Before turning to the specific allegations and evidence in this case, the majority engages in a lengthy discussion of the applicable legal standards. It is well to consider first, therefore, the soundness of this analysis, particularly as it relates to the third and fourth elements.[7]

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[7] My analysis of the third and fourth elements makes it unnecessary to consider the second element of the plaintiffs' claims, but it is noteworthy that the majority opinion overstates the evidence presented to the district court on that point in several respects. For example:

> • The majority emphasizes twice that Dillard's had adopted a "zero tolerance policy" for shoplifters, but that "white shoplifters . . . were sometimes allowed to leave if they returned stolen merchandise or paid for it." *Ante*, at 4, 23. In fact, the words "zero

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tolerance policy" appear nowhere in the testimony cited by the appellants. As for "white shoplifters," there is evidence in the record about *one* white person who was followed in the store by security officer Kenneth Gregory on suspicion that he intended to shoplift a hat, but was stopped and questioned by store manager Don Edson before he exited the store. (Appellants' App. at 141-42). Gregory said that he would have apprehended the man for shoplifting if he left the store premises with the hat. (*Id.* at 141). He testified that when several other "people" asked Gregory "not to be arrested" and "to reimburse the store," Edson directed that they be prosecuted to the full extent of the law. (*Id.* at 142). There is no evidence concerning the race of the "people" who were prosecuted or that any white person arrested by Gregory for shoplifting was not prosecuted to the full extent of the law. Gregory testified that he "concluded" that Edson would not have stopped a similarly-situated black person suspected of preparing to shoplift a hat, but he produced no evidence that Edson ever intentionally refrained from questioning a suspected black shoplifter under similar circumstances. (*Id.* at 143).

• The majority emphasizes twice that former employee Rick Beasley "observed 'systematic' racial discrimination at Dillard's that he said was carried out by many employees." *Ante,* at 5, 23. In fact, while Beasley intimated vaguely that "a number" of employees may have engaged in unspecified "discrimination," he named only two employees, saying "I wouldn't call them racists," but that "maybe they had tendencies to watch folks that should not [sic]." (Appellants' App. at 153). As for the assertion of "systematic" racial discrimination, Beasley gave this response when asked about a store manager: "Do I think he's letting it happen? Not personally. But because it's systematic, it happens. And if it's not brought to his attention with credible evidence, he

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The third element of the § 1981 claims in this case requires proof that the plaintiff was engaged in protected activity in the retail shopping environment. The majority ultimately concludes that a plaintiff must make a "tangible attempt to contract" and show that she "actively sought to enter into a contract with the retailer" to meet this element. *Ante,* at 15. These standards are consistent with the approach set forth in the law of our sister circuits, which has firmly required that a shopper in a retail establishment must show an attempt to purchase, involving a specific intent to purchase an item and a step toward

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can't do anything about it." (*Id.* at 155). Beasley did not attribute any scheme or plan to Dillard's. His statement actually expresses the opposite thought. Beasley's point was that individual employees would "take their own personal views and do the things they wanted to do," (*id.* at 153), and unless this "systematic" [sic] activity of individual employees was brought to the attention of the store manager, "he can't do anything about it." (*Id.* at 155). Indeed, Beasley's view was that Dillard's should perform a study that compared the treatment of young Caucasian men with an "urban look" with that of young African-American men with an "urban look" to determine *whether* they would be treated differently by store employees. (*Id.* at 162).

• The majority says Maren Snell testified that she "frequently witnessed African Americans" unsuccessfully attempt to return merchandise carrying POP labels. *Ante,* at 5. Snell actually testified that there were "a few instances," and when pressed for details, she could identify only one. (Appellants' App. at 189-90).

completing that purchase, to state a claim under § 1981.

The 1991 amendments to § 1981 broadened the scope of the statute, but they retained the statute's focus on contract obligations. Indeed, Congress "positively reinforced that element by including in the new § 1981(b) reference to a '*contractual relationship.*'" *Domino's Pizza,* 546 U.S. at 477 (emphasis in original). A plaintiff, therefore, "must point to some contractual relationship in order to bring a claim." *Youngblood v. Hy-Vee Food Stores, Inc.,* 266 F.3d 851, 855 (8th Cir. 2001).

The Tenth Circuit specifically refrained from adopting an expansive interpretation of § 1981 that would "protect[ ] customers from harassment upon entering a retail establishment." *Hampton v. Dillard Dep't Stores, Inc.,* 247 F.3d 1091, 1118 (10th Cir. 2001). Stating that it could not "extend § 1981 beyond the contours of a contract," the court rejected the claim of a plaintiff who failed "to make or attempt to make a purchase" at a department store. *Id.* In reaching this conclusion, the Tenth Circuit found itself "aligned with all the courts that have addressed the issue" in requiring that "there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Id.* (citing *Wesley v. Don Stein Buick, Inc.,* 42 F. Supp. 2d 1192, 1201 (D. Kan. 1999); *Sterling v. Kazmierczak,* 983 F. Supp. 1186, 1192 (N.D. Ill. 1997); *Lewis v. J.C. Penney Co.,* 948 F. Supp. 367, 371-72 (D. Del. 1996)).

The Seventh Circuit likewise upheld the dismissal of a claim brought by two shoppers who were examining time stamps and discussing the advantages and disadvantages of three or four models when they were approached by police. *Morris v. Office Max, Inc.*, 89 F.3d 411, 414-15 (7th Cir. 1996). Because the shoppers failed to demonstrate that they would have attempted to purchase the merchandise, they failed to state a claim under § 1981. Interference with "prospective contractual relations," said the court, was insufficient, even though the incident in question "understandably may have discouraged them from patronizing the store." *Id.*; *see also Shawl v. Dillard's, Inc.*, 17 F. Appx. 908, 912 (10th Cir. 2001) (unpublished) (holding that the plaintiff had "not shown an actual contract loss" because "[t]he only thing that prevented her from purchasing the sandals was that the salesperson had been rude to her and she believed that he would get a commission if she purchased the sandals at that time," so she "opted not to pursue the contract"). Decisions that have recognized a claim under § 1981, by contrast, involved completed purchases or specific attempts to purchase merchandise. *Green v. Dillard's, Inc.*, 483 F.3d 533, 538 (8th Cir. 2007) (holding that shopper satisfied third element by selecting a specific item in display case and communicating to sales clerk her desire to purchase that item); *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 435 (4th Cir. 2006) (holding that plaintiffs who had purchased and received a gift package entitling the recipient to a variety of salon services had demonstrated a contractual relationship); *Williams v.*

Staples, Inc., 372 F.3d 662, 668 (4th Cir. 2004) (holding that the plaintiff sought to enter a contractual relationship when he offered payment by check); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 874 (6th Cir. 2001) (holding that a plaintiff who had selected merchandise for purchase by placing it in her cart, had the means to purchase, and would have purchased the merchandise had she not been asked to leave the store had shown a sufficient contractual relationship to bring a § 1981 claim).

A customer's act of taking goods from a sales rack or shelf in a retail establishment does not by itself create a contractual relationship. Courts have found a contractual relationship in that circumstance only where the customer takes possession of an item with the intent to purchase it and acts for the purpose of doing so. *Barker v. Allied Supermarket,* 1979 OK 79, 596 P.2d 870, 871 (Okla. 1979); *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691, 693-94 (Ga. Ct. App. 1976); *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1, 8 (Md. 1975); *Gillispie v. Great Atlantic & Pacific Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441, 444 (N.C. Ct. App. 1972). When a customer lifts an item from a shelf or rack for the purpose of examining it to decide whether to make a purchase, there is no contractual relationship with the seller, *McQuiston v. K-Mart Corp.*, 796 F.2d 1346, 1348 (11th Cir. 1986), and the customer has not "sought to enter" into a contractual relationship as required to state a claim under § 1981. *See Domino's Pizza*, 546 U.S. at 476 (quoting

Runyon v. McCrary, 427 U.S. 160, 172, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)). An attempt to contract, not mere interest in an item, is required to satisfy the third element of § 1981.

The majority recites that a plaintiff may meet the fourth element of a § 1981 claim – interference with protected activity – by presenting evidence that the retailer "thwarted" the shopper's attempt to make a contract. *Ante*, at 705 (citing *Green*, 483 F.3d at 539). If properly applied, this formulation is consistent with the decisions of other circuits, and with the Supreme Court's explanation that § 1981 applies to discrimination that "blocks" the creation of a contractual relationship. *Domino's Pizza*, 546 U.S. at 476.

It is well recognized, however, that not all conduct of a merchant that offends a customer is sufficient to constitute actionable interference with a contractual relationship for purposes of § 1981. The Fifth Circuit, for example, has held that where a shopper abandoned his purchase due to a merchant's mistreatment of the shopper's daughter, the merchant did not "actually interfere" with or "thwart" an attempted purchase in a manner that violated § 1981. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358-59 (5th Cir. 2003). In that circuit, "a § 1981 claim must allege that the plaintiff was *actually prevented, and not merely deterred*, from making a purchase or receiving a service after attempting to do so." *Id.* (emphasis in original) (internal quotations omitted); *accord Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 752 (5th

Cir. 2001); *see Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 U.S. Dist. LEXIS 15796, 1996 WL 617165, at *3-4 (N.D. Ill. Oct. 23, 1996).

The Seventh Circuit similarly has held that where a shopper opts not to contract with a merchant because the shopper is offended by certain racially motivated activity of an employee of the store, there is no claim under § 1981. In *Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000), a customer left a store after he was offended by the behavior of an assistant sales manager, who said she "would not serve" the customer and "gave him the finger." *Id.* at 520. The court held that while it could not fault the customer for taking offense, this offensive conduct was insufficient to state a claim under § 1981, because the merchant was "not responsible for terminating the transaction." *Id.* at 522.

A primary shortcoming of the majority opinion, in my view, is that it fails to establish an appropriate objective standard for determining what conduct of a retail merchant is sufficient to "thwart" or "block" a shopper's attempt to purchase merchandise. For the most part, the court opts simply to call for "careful line-drawing, case by case," *ante,* at 16, without providing any standard by which to locate that line in this case or future cases. The closest thing to a governing standard is the majority's suggestion that when a shopper chooses to abandon a purchase after an action of the merchant that is "demeaning and humiliating," *ante,* at 22, then the merchant has "thwarted" the transaction. To the extent this

"demeaning and humiliating" test is the standard, however, it fails to distinguish the opinions of other circuits concluding that discriminatory surveillance or watchfulness is not actionable, *see Garrett v. Tandy Corp.*, 295 F.3d 94, 101 (1st Cir. 2002); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1108 (10th Cir. 2001), or decisions holding that other demeaning or humiliating actions of a merchant do not constitute actionable interference under § 1981. *Arguello*, 330 F.3d at 358-59; *Bagley*, 220 F.3d at 522; *see also Morris v. Office Max, Inc.*, 89 F.3d at 415 (rejecting claim under 42 U.S.C. § 1982, which is "construed in tandem" with § 1981, where although store's summoning of police to investigate shoppers was "undoubtedly disconcerting and humiliating," and "understandably may have discouraged them from patronizing the store," no actions of the police or the store personnel "actually impaired or interfered with their right to make a purchase").

While I believe, therefore, that the majority's approach is more expansive than the statute will support, Dillard's position regarding the "interference" element is conversely too narrow. Dillard's takes the Fifth Circuit's language that a plaintiff must be "actually prevented, not merely deterred" from making a contract to an unreasonable extreme by asserting that racial harassment could never amount to a violation of § 1981 in the retail context, so long as the victimized customer eventually would be permitted to make a purchase. Suppose, for example, that a merchant established two checkout

lines, one for African-American customers and one for white customers, but required African-American customers to wait in line for several hours before making a purchase, while white customers were serviced immediately. Or suppose that African-American customers were permitted to make purchases only after running a gauntlet of racial slurs and epithets, physical threats, and refusals of service by multiple store clerks. The rather implausible implication of Dillard's position is that these hypothetical shoppers, if they choose to forego an opportunity to purchase on these conditions, are merely "deterred" from making a contract, and are thus not deprived of the "same right" to make contracts as is enjoyed by white citizens. At some point, racially motivated harassment effectively "blocks the creation of a contractual relationship," *Domino's Pizza,* 546 U.S. at 476, and gives rise to liability under § 1981. *See Green,* 483 F.3d at 539.

To define what level of racial harassment is sufficient to constitute interference with the right to make and enforce contracts under § 1981, I would turn to the body of law that already has developed in our court and other circuits concerning racial harassment and § 1981 in the employment context. In 1991, Congress expanded the scope of § 1981 to supersede the Supreme Court's decision in *Patterson,* which determined that racial harassment after the formation of a contract did not violate the previous version of § 1981. 491 U.S. at 175-85; *see* H.R. Rep. No. 102-40(I), at 89-93 (1991), *as reprinted in* 1991

U.S.C.C.A.N. 549, 627-631. After the 1991 amendments, it is clear that racial harassment may, in certain circumstances, deprive a minority citizen of the "same right" to make and enforce contracts as is enjoyed by white citizens.

We have held, however, that Congress did not legislate that *all* racial harassment will trigger liability under § 1981, even though it may be offensive and reprehensible, and even though it may burden or have a negative effect on the enjoyment of contractual rights. To interfere with the right to make and enforce contracts in the employment environment, racial harassment must be "severe or pervasive," *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 908 (8th Cir. 2003), as it "would be viewed objectively by a reasonable person" and "as it was actually viewed subjectively by the victim." *Elmahdi*, 339 F.3d at 652; *see Patterson*, 491 U.S. at 208 (Brennan, J., dissenting in part) ("The question . . . should be whether the acts constituting harassment were sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner."). Whether this "high threshold of actionable harm" is satisfied in the employment context depends on such factors as whether the environment is "permeated with discriminatory intimidation, ridicule, and insult," whether the plaintiff has been subjected to a "steady barrage of opprobrious racial comment," and whether the harassment includes conduct that is physically threatening or humiliating, as opposed to an

"offensive utterance." *Elmahdi,* 339 F.3d at 652-53. In the workplace setting, the severity and pervasiveness of alleged harassment is typically measured over a period of time, whereas harassment in a retail environment must sometimes be evaluated on a single occasion involving a single alleged contractual event, but the touchstone of "severe or pervasive" harassment need not be altered.

Although Congress in 1991 was advised that "most litigation under section 1981 is employment discrimination litigation," H.R. Rep. No. 102-40(I), at 90, the amended statute applies to "all phases and incidents of the contractual relationship." *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 302, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). Nothing in the text of the statute suggests that courts should deem certain harassment insufficient to interfere with the "enjoyment of all benefits, privileges, terms and conditions of the contractual relationship" in an employment context, but consider the same harassment sufficient to interfere with the "making" of a contract in the retail context, *cf. ante,* at 16 n.5, given that both situations are encompassed within the same statutory definition of "make and enforce contracts." 42 U.S.C. § 1981(b). There is no good reason to believe that Congress intended to make actionable a broader range of harassment in the retail shopping context – an area that was not even the focus of legislative attention in 1991 – than in the employment area, which was the driving concern behind the legislation. Indeed, the body of precedent that has developed in

the federal courts concerning § 1981 in the retail context appropriately "reflects a concern that too broad a reading would produce countless lawsuits based on minor or imagined discourtesies inflicted on customers by retail employees." *Garrett,* 295 F.3d at 107 (Boudin, C.J., dissenting in part).

Accordingly, while I agree with the appellants that racial harassment in the retail shopping environment may result in liability under § 1981, and disagree with Dillard's apparently blanket position to the contrary, I believe that a plaintiff must show that such conduct by a merchant rises to the level of severe or pervasive harassment to establish a violation of the statute. This standard is consistent with the leading decisions in the retail context, which hold that a shopper's voluntary decision to leave an establishment, in the face of conduct that is offensive but not objectively severe or pervasive harassment, does not show the requisite interference with contractual rights under § 1981. *E.g., Arguello,* 330 F.3d at 358-59; *Bagley,* 220 F.3d at 521-22; *see also Morris,* 89 F.3d at 415. It also aligns with our court's decision in *Green,* which held that where a sales clerk "explicitly refused service" to two shoppers based on race, "treated them at all times with pronounced hostility," "discouraged her coworker from assisting them by questioning their ability to pay," directed "a most egregious racial slur" and "forceful racial insult" at the shoppers, and "actively hindered" the efforts of another sales clerk to serve the customers, the

plaintiffs had shown conduct sufficiently severe to constitute actionable interference. 483 F.3d at 539.

II.

Turning to the specific claims at issue in this appeal, the district court resolved nine of them on a motion to dismiss, holding that an allegation of discriminatory surveillance alone was insufficient to state a claim under § 1981. The complaint in this case involved seventeen plaintiffs, thirteen of whom have appealed. In the complaint, each plaintiff made a summary allegation, quoted by the majority, that he or she had been "deprived of services" while similarly situated white persons were not, or had received services "in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." (Appellants' App. at 50-85). To explain the grounds on which their claims rested, plaintiffs Crystal Gregory, Alberta Turner, and Carla Turner included factual allegations concerning their shopping experiences at Dillard's, and alleged that employees of Dillard's had taken certain actions based on race in those instances that gave rise to liability under § 1981. In sharp contrast to Gregory and the Turners, the nine appellants considered on the motion to dismiss alleged in their factual section of the complaint only that "each experienced . . . instances at Dillard's Columbia, Missouri store in which they were followed and/or otherwise subjected to surveillance based upon their race." (Appellants' App. at 50).

A civil rights complaint "must contain facts which state a claim as a matter of law and must not be conclusory." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995); *see also Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976). While a plaintiff need not set forth "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007), or "specific facts" that describe the evidence to be presented, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (per curiam), the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. *Twombly*, 127 S. Ct. at 1965 n.3. A district court, therefore, is not required "to divine the litigant's intent and create claims that are not clearly raised," *Bediako*, 354 F.3d at 840, and it need not "conjure up unpled allegations" to save a complaint. *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006) (internal quotation omitted).

In this case, the nine motion-to-dismiss appellants did spell out the factual basis for their claims. The grounds upon which their claims rest is an assertion that Dillard's caused them to be followed and surveilled while they were in the store. (Appellants' App. at 50). This factual allegation fails to state a claim. Absent an allegation that the plaintiffs attempted to purchase merchandise, the complaint fails to meet the foundational pleading requirements for a suit under § 1981, because it does not satisfy the third element that the plaintiffs attempted to make a contract. Protected activity

under the statute does not extend to "the mere expectation of being treated without discrimination while shopping." *Hampton,* 247 F.3d at 1118; *accord Garrett,* 295 F.3d at 101.

Nor does the complaint allege sufficient interference with asserted protected activity to state a claim under the fourth element. The First Circuit, observing that "[i]n a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movement," held that an allegation of discriminatory surveillance is insufficient to state a claim under § 1981. *See Garrett,* 295 F.3d at 101. The Tenth Circuit reached the same conclusion, stating that "discriminatory surveillance" is "not actionable under § 1981." *Hampton,* 247 F.3d at 1108. Racially biased watchfulness, however reprehensible, does not amount to severe or pervasive harassment that is actionable. It does not "block" a shopper's attempt to contract. *See Domino's Pizza,* 546 U.S. at 476. It is evident to me that the district court's requirement of "per se interference" – used when discussing the claims of plaintiffs who had not alleged anything "other than being followed or subjected to surveillance," *ante,* at 10 – was simply another way of expressing the same conclusion. I thus agree with the district court that the reasoning of *Garrett* resolves these claims, and I would not reverse the district court for evaluating the complaint based on the factual allegations actually made by the plaintiffs.

The § 1981 claims of four other appellants were dismissed on a motion for summary judgment. The majority affirms with respect to one appellant, but reverses the judgment as to the other three. The district court properly applied the law to the applicable facts, and I would affirm the judgments on all of these claims as well.

Crystal Gregory presented evidence that a sales associate followed her as she selected a couple pairs of pants from a rack and took them to a fitting room at Dillard's. Gregory testified that when she came out of the fitting room, the sales associate had a "little smirk on her face," and that two officers were right outside the fitting room leaning on clothing racks. (Appellants' App. at 286). Gregory said she returned to the fitting room, removed the pants, and then took the pants to the counter, where the sales clerk was "getting ready to ring me up." (*Id.* at 287). At that point, Gregory told the sales clerk that she was not buying the pants.

The district court correctly concluded that this evidence does not establish interference with protected activity sufficient to prove a violation of § 1981. Evidence of surveillance or watchfulness on its own is insufficient to state a claim, *Garrett,* 295 F.3d at 101; *Hampton,* 247 F.3d at 1108, and the majority's effort to distinguish "merely being watched" from "being treated in a demeaning and humiliating fashion," *ante,* at 22, suggests a distinction without a difference on this record. In *Garrett,* three employees monitored the plaintiff throughout his visit to a store, and "at

least one of them accompanied him throughout his visit." 295 F.3d at 96. Nonetheless, the *Garrett* court held that this active trailing of a minority shopper amounted to no more than an "unadorned" – and legally insufficient – claim that the plaintiff was carefully watched while on the premises. *Id.* at 101. The addition of a smirk on the face of a Dillard's sales clerk does not meaningfully distinguish this case from *Garrett, cf. ante,* at 21, particularly where Gregory admits that Dillard's did not refuse to contract, but rather that a sales clerk was "getting ready to ring [her] up" when Gregory herself declared that she would not make a purchase. As noted, several courts have held that conduct of a merchant that may be described as demeaning or humiliating does not amount to actionable interference with a contractual interest when a shopper abandons a purchase. *See Arguello,* 330 F.3d at 358-59 (holding no actionable interference where plaintiff voluntarily set product on counter and left without trying to buy it after sales clerk made racially derogatory remarks and mistreated plaintiff's daughter); *Bagley,* 220 F.3d at 520 (holding no actionable interference where plaintiff left store after customer was "offended" by sales clerk who refused to serve him, made obscene gesture, and previously stated that "I hate f* * *ing Mexicans"); *Morris v. Office Max, Inc.,* 89 F.3d at 415 (holding no actionable interference although store's conduct was "undoubtedly disconcerting and humiliating"); *see also Denny,* 456 F.3d at 435, 437 (recognizing that while "[t]he Reconstruction Congress wrote broadly," a plaintiff's "failure to advance a pending or

current contractual relationship [has] proved fatal to a § 1981 claim," and distinguishing *Morris* on that basis) (Wilkinson, J.); *Garrett,* 295 F.3d at 102 ("We do not think that a customer can hold a merchant liable for denying the right to a refund that the customer never pursued").

In another apparent attempt to distinguish *Garrett,* the majority asserts that when Gregory "went to the manager on duty to complain, she received no offer of assistance and left the store," and concludes from these facts that a manager "thwarted and interfered with" Gregory's attempt to purchase a pair of pants. *Ante,* at 21. The *entirety* of evidence on this point is a snippet of Gregory's deposition testimony concerning what happened after Gregory told the sales clerk that she did not wish to purchase the pants: "And so I talked to the manager, and I believe her name was Janet. And she was not of much help, almost as if she did not care, and so I left and I left very upset." (Appellants' App. at 288). The evidence thus establishes only Gregory's subjective opinion that the manager was "not of much help." There is no evidence whatever concerning what Gregory asked the manager to do or what the manager offered to do. It is not a reasonable inference from this testimony that the manager blocked an attempt to purchase a pair of pants, when it is undisputed that Gregory *declined* a sales clerk's offer to ring up the sale. And even the majority's unduly generous reading hardly distinguishes *Garrett.* In that case, the customer's § 1981 claim was dismissed

even though the store manager responded with "patently false" information when the customer called to complain about racially discriminatory treatment. *Garrett,* 295 F.3d at 97.

The claims of Alberta and Carla Turner were properly dismissed for similar reasons. The Turners presented evidence that after Alberta purchased several pairs of shoes at the Dillard's store, she, Carla, and Carla's children began to examine clothing in the children's department. Carla took her daughter to a fitting room, and when she exited the room, a sales associate and a security guard were outside looking at them. The security guard then followed Carla as she walked through the store to rejoin Alberta. Upset by the surveillance, Alberta took the clothing items to a sales counter, told the associate that she would not make a purchase, and told another clerk that "you just made someone lose a sale." (Appellee's App. at 170).

Again, the evidence presented by the Turners shows, at most, discriminatory surveillance and watchfulness, which is not actionable under § 1981. Moreover, as with Ms. Gregory, Dillard's demonstrated its willingness to contract by selling shoes to Alberta Turner on the very same visit, but the Turners nonetheless abandoned their effort to purchase children's clothing. On this record, the district court properly dismissed the claims. *Garrett,* 295 F.3d

at 101; *Arguello,* 330 F.3d at 358-59; *Bagley,* 220 F.3d at 521-22; *see also Morris,* 89 F.3d at 415.[8]

* * *

Our court has made clear that "[s]ection 1981 does not provide a general cause of action for race discrimination," *Youngblood,* 266 F.3d at 855, and

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[8] To bolster its argument with "corroborative evidence" of an alleged "larger pattern of race based harassment and denial of services," the majority asserts that "Michael Richmond and Debra Hamilton testified . . . that they were denied service." *Ante,* at 22. The evidence does not support this broad characterization. Richmond testified that on one occasion, a salesperson turned and walked away from him when he attempted to check out, but that another salesperson offered to assist him before he left the store, and that he made other purchases at Dillard's earlier on the same day. (Appellants' App. at 230-34). Richmond said that on another occasion, a Dillard's salesperson tried to direct him away from expensive jewelry and toward bargain-priced jewelry. Richmond responded by saying, "I want to see this shit here," which led the sales clerk to say "[y]ou have no reason to be rude," and prompted Richmond's own mother to chastise him. He then left the department, complained to an assistant manager (who said she was "really sorry" that Richmond felt he was treated poorly), and left the store. (*Id.* at 221-22). Hamilton testified that she thought a salesperson once served a woman who arrived at a sales counter after Hamilton had arrived. Hamilton conceded, however, that the other customer did not confirm Hamilton's belief about who arrived first, and that after Hamilton said, "I thought I was here first," the salesperson said, "Well, I'm sorry." (*Id.* at 249). Hamilton testified that she then said, "Don't worry about it now" and "went ahead and left." (*Id.* at 248-49). Appellants cite no evidence concerning the race of the other shopper involved, and Hamilton made no assertion that the sales clerk refused to provide service after Hamilton said, "I thought I was here first."

other circuits have declined to recognize a § 1981 claim based on racially-motivated surveillance by a retail merchant. For the foregoing reasons, I would affirm the judgment of the district court dismissing the claims brought under § 1981.[9]

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[9] The majority proceeds to conclude that the district court also erred in dismissing with prejudice the appellants' claims under the Missouri Human Rights Act. These claims were before the district court based on supplemental jurisdiction under 28 U.S.C. § 1367(a). Whether the MHRA, through its definition of "place of public accommodation," extends to retail establishments is a novel question of state law. Because I conclude that the district court properly dismissed the federal claims, I would remand the case with directions to modify the final judgment so as to dismiss the claims under the MHRA *without* prejudice, so they may be decided by the courts of Missouri. *See Birchem v. Knights of Columbus,* 116 F.3d 310, 314-15 (8th Cir. 1997); *Ivy v. Kimbrough,* 115 F.3d 550, 552-53 (8th Cir. 1997) ("In most cases, when federal and state claims are joined and the federal claims are dismissed on a motion for summary judgment, the pendent state claims are dismissed without prejudice to avoid needless decisions of state law . . . as a matter of comity and to promote justice between the parties.") (internal quotation and citation omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CRYSTAL GREGORY, et al.,	)	
Plaintiffs,	)	No. 02-04157-CV-C-SOW
vs.	)	(Filed Jan. 3, 2005)
DILLARD'S, INC.,	)	
Defendant.	)	

ORDER

Before the Court is defendant Dillard's Inc.'s ("Dillard's") Motion to Dismiss Plaintiffs' Third Amended Complaint and to Strike Claims (Doc. # 148). The motion is fully briefed. For the reasons set forth below, Dillard's motion is granted in part and denied in part.

This is an action brought by seventeen plaintiffs against Dillard's Inc., alleging violations of 42 U.S.C. § 1981 and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.065. Dillard's moves to dismiss plaintiffs' claims for failure to state a claim upon which relief can be granted.[1] Dillard's also moves to strike certain

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[1] When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must construe the complaint liberally and assume all factual allegations to be true. *Goss v. City of Little Rock*, 90 F.3d 306, 308 (8th Cir. 1996). This Court may order dismissal only if it appears beyond doubt that

(Continued on following page)

claims that allegedly exceed the scope of amendment granted by the Court.[2]

The majority of Dillard's motion is focused on the claims of the original plaintiffs in this lawsuit:

> Crystal Gregory, Alberta Turner, and Carla Turner. The factual circumstances surrounding these three plaintiffs' claims have been fully developed through discovery, and the merits of said claims are currently the subject of various Motions for Summary Judgment. Because the claims are fully developed and briefing on the merits of said claims has already occurred, it makes little sense for this Court to address the claims through an Order on Dillard's Motion to Dismiss. Instead, the Court will address the merits of the claims through a separate Order on Dillard's Motions for Summary Judgment.

The next set of claims that are challenged in Dillard's motion are the claims of the following plaintiffs: Antwinette Avery, Michael Butler, Treva Gage, Debra Hamilton, Capria Lee, Arnel Monroe,

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plaintiffs can prove no set of facts that would entitle them to relief. *McCormick v. Aircraft Mechanics Fraternal Ass'n*, 340 F.3d 642, 644 (8th Cir. 2003).

[2] Federal Rule of Civil Procedure 12(f) states, in pertinent part, that the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Michael Richmond, Maren Snell, Felicia Turner, Michael Warrick, and LaShanda Wisham.

These plaintiffs tersely allege that they "have each experienced, within the time period of 1998 to the present, instances at Dillard's Columbia, Missouri, store in which they were followed and/or otherwise subjected to surveillance based upon their race."

"Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001). To establish a prima facie case of discrimination under Section 1981, plaintiffs must show: (1) that they are members of a protected class; (2) that Dillard's intended to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in Section 1981. *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004). Section 1981 states, in pertinent part, that all persons shall have the same right to "make and enforce contracts" and the right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a)-(b).

The main issue here is whether plaintiffs have satisfied the third element of a prima facie case of discrimination under Section 1981. On point is a similar case decided by the First Circuit captioned *Garrett v. Tandy Corporation*, 295 F.3d 94 (1st Cir. 2002). In *Garrett*, an African American man entered a Radio Shack store seeking to purchase a police scanner. *Id.* at 96. While at the Radio Shack store,

three white employees monitored the plaintiff's movements, and at least one of the employees accompanied the plaintiff during his visit. *Id.* Upon learning, after the plaintiff had left the Radio Shack store, that merchandise was missing, the store falsely accused the plaintiff of theft. *Id.* at 96-97.

The plaintiff later filed a lawsuit against the Radio Shack store, alleging, among other things, violations of 42 U.S.C. § 1981. *Id.* at 97. Radio Shack moved to dismiss plaintiff's Complaint for failure to state a claim upon which relief could be granted, which the District Court granted. *Id.*

On appeal, the plaintiff argued that Radio Shack was liable under Section 1981 because he was deprived of contractual rights when Radio Shack's staff put him under surveillance while he was in the store. *Id.* at 101. The First Circuit rejected the plaintiff's argument, stating that the plaintiff's case:

> [B]oils down to the claim that he was watched carefully while on the premises. Unadorned, that claim cannot succeed. In a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movements. So long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases, it is not actionable under section 1981. In other words, the challenged surveillance must have some negative effect on the shopper's

> ability to contract with the store in order to engage the gears of section 1981.

Id. (citations omitted)

This Court is persuaded by the reasoning of the First Circuit. In applying *Garrett* to the facts of this case, plaintiffs allege that they "have each experienced, within the time period of 1998 to the present, instances at Dillard's Columbia, Missouri, store in which they were followed and/or otherwise subjected to surveillance based upon their race." Plaintiffs do not allege that they were questioned, searched, detained, or subjected to any physical activity other than being followed or subjected to surveillance.

Because Section 1981 requires a *per se* interference with plaintiffs' ability to contract, and because plaintiffs have failed to allege facts demonstrating a *per se* interference, this Court must grant Dillard's motion. Accordingly, the claims asserted by plaintiffs Antwinette Avery, Michael Butler,[3] Treva Gage, Debra Hamilton, Capria Lee, Arnel Monroe, Michael Richmond, Maren Snell, Felicia Turner, Michael Warrick, and LaShanda Wisham are dismissed.

Lastly, plaintiffs Michael Butler, Deidre Golphin, and Cecilia Young tersely allege that they have "each experienced, within the time period of 1998 to the present, instances at Dillard's Columbia, Missouri,

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[3] Michael Butler has an additional claim that, as discussed more fully below, is not being dismissed.

store in which they were treated differently based upon their race with regard to returns and/or check-writing." Dillard's argues that these claims should be stricken because they exceed the scope of amendment permitted by this Court.

This Court has presided over this case since the Fall of 2002. Significant discovery, including the depositions of plaintiffs Butler, Golphin, and Young, has already occurred. Judicial economy and the efficient use of litigant resources dictate that the check writing and returns/exchanges claims continue to remain before this Court, rather than being asserted through a separate lawsuit. Accordingly, this Court denies Dillard's motion as to the claims asserted by plaintiffs Michael Butler, Deidre Golphin, and Cecilia Young.

As already mentioned, significant discovery has already occurred in this case. As a result, the Court is setting the case for the next civil trial docket, which begins on August 15, 2005. A revised scheduling order detailing the parties' upcoming deadlines will be issued in a short period of time.

Based on the foregoing, it is hereby

ORDERED that defendant Dillard's Inc.'s Motion to Dismiss Plaintiffs' Third Amended Complaint and to Strike Claims (Doc. # 148) is granted in part and denied in part.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States
District Judge

Dated: 1-3-05

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CRYSTAL GREGORY, et al.,	)	
Plaintiffs,	)	No. 02-04157-CV-C-SOW
v.	)	(Filed Jul. 22, 2005)
DILLARD'S, INC.,	)	
Defendant.	)	

ORDER

Before the Court are defendant Dillard's, Inc.'s Motion for Summary Judgment Against Plaintiffs Alberta and Carla Turner (Doc. # 68), Motion for Summary Judgment Against Plaintiff Crystal Gregory (Doc. # 70), Motion to Strike Affidavit of Theresa Cain (Doc. # 88),[1] Motion to Amend January 3, 2005, Order and to Dismiss Plaintiff Jeff McKinney or in the Alternative for Summary Judgment (Doc. # 161), and Motion for Summary Judgment on the Remaining Claims Asserted by Michael Butler,

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[1] The Cain affidavit will not be relied upon by the Court in ruling on the various motions for summary judgment. This failure to rely upon the Cain affidavit is not an endorsement of the arguments contained in Dillard's motion to strike. As will be evident below, the Court simply does not think that the Cain affidavit is relevant for purposes of ruling upon the various motions for summary judgment. Dillard's motion to strike is therefore denied as moot.

Deidra Golphin,[2] and Cecilia Young (Doc. # 163). The motions are fully briefed. For the reasons discussed below, Dillard's motion against Alberta and Carla Turner is granted, Dillard's motion against Crystal Gregory is granted, Dillard's motion to strike is denied as moot, Dillard's motion against Jeff McKinney is granted in part and denied in part,[3] and Dillard's motion against Michael Butler, Deidra Golphin, and Cecilia Young is granted in part and denied in part.

I. Background

This lawsuit concerns the following claims: (1) violations of 42 U.S.C. § 1981, and (2) violations of the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.065. All of the plaintiffs in this case are African-American. The claims of each plaintiff and the material facts relevant to said claims for purposes of the pending motions are summarized below.

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[2] Golphin's claims against Dillard's have been dismissed with prejudice. *See* Doc. # 181.

[3] Dillard's has sufficient notice of McKinney's claims and is therefore not prejudiced by the arguable pleading deficiencies in the third amended complaint. Dillard's motion to dismiss is therefore denied.

A. Alberta and Carla Turner

The Turners' claims are based on two[4] incidents at the Dillard's store in Columbia, Missouri. One incident involved only Alberta and occurred during a shopping trip on May 10, 2002. The remaining incident involved both Alberta and her daughter Carla and occurred on a shopping trip during Memorial Day, 2002.

1. May 10, 2002

On May 10, 2002, Alberta and her daughter Felicia visited Dillard's to purchase shoes. After trying on and purchasing shoes, Alberta went to the cosmetic department to look at and purchase makeup. While at the cosmetic department, Alberta observed a security guard. Alberta does not know if the security guard was already in the cosmetic department or if he entered after she arrived. Alberta also does not know if she was followed in the store on that day. Alberta did testify that she believed she had been followed in Dillard's on a number of prior occasions. The security guard said nothing to Alberta, and there was no exchange of any kind between the security guard and Alberta. Alberta purchased merchandise from the

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[4] The alleged discriminatory conduct at issue in the Christmas, 2001, incident was not targeted at Alberta. Consequently, the Court will not consider the incident as a separate claim of race discrimination against Alberta.

cosmetic department. She then left the store without incident.

2. Memorial Day, 2002

On Memorial Day, 2002, Alberta and Carla went to Dillard's to purchase shoes for Alberta's grandchildren, including Carla's daughter. After purchasing some shoes from the shoe department, the grandchildren wanted to look at some clothes on a sale rack. Alberta agreed to stay and browse the clothes. Alberta stayed with one granddaughter while Carla took her daughter to another department to look at clothes for slightly older children. Carla took the shoes that had been purchased, which were inside two large shopping bags.

After arriving at the department, Carla and her daughter picked out some items and went into the fitting room. When they emerged from the fitting room, Carla saw a sales associate and a security guard "hanging" or "laying" on a sale rack. Carla estimated that the sale rack was "10 steps" from the fitting room. The sales associate and security guard were not looking in Carla's direction, but were instead facing and talking to each other. When Carla walked by the sales associate and security guard, neither addressed her. The sales associate, however, looked over at the two bags Carla was carrying, which Carla did take into the fitting room. The security guard did not look over at the bags. The sales

associate then walked to her cash register to serve other customers.

Carla left the department she was shopping in and walked toward Alberta in another department. Carla testified that the security guard walked parallel to her in a separate department. She believed the security guard was following her. Carla and the security guard were separated by an aisle and racks of merchandise. Carla did not make eye contact with or speak to the security guard until she reached her mother. Alberta testified that Carla appeared to be "upset" as she approached her. Carla asked the security guard why he was staring at her. The security guard said nothing in return. Carla then told her mother what had she just happened. As Carla was telling Alberta about the incident, Alberta noticed the security guard in a different department from which her and Carla were standing. Alberta then approached the security guard and said something to him. She cannot remember if he said anything in return. Alberta then decided not to purchase certain merchandise that she and Carla had picked out and to leave the store. As they left the store, Alberta and the sales associate who had been standing by the fitting room had an exchange. Specifically, Alberta indicated to the sales associate that she had just lost several hundred dollars in sales. The sales associate then "snickered" and said, "So? So what?" It appears that the security guard approached them and asked what was going on. The Turners then left the store without further incident.

B. Crystal Gregory

Gregory's claims are based on three[5] incidents at the Dillard's store in Columbia, Missouri: (1) an incident on February 3, 2001, (2) an incident involving the removal of a security tag on an unspecified date, and (3) an incident on April 7, 2001.

1. February 3, 2001

On February 3, 2001, Gregory visited Dillard's with her sister to shop for a "dressy" outfit. Gregory and her sister visited two departments and then went to the Ralph Lauren department. After arriving at the Ralph Lauren department, a sales associates named Tracy asked Gregory if she could help her. Gregory responded that she did not need any help. Tracy then began to "follow" Gregory. Gregory did not ask Tracy why she was following her, nor did Tracy make any comments to Gregory during this time. Gregory then selected a pair of pants and entered a fitting room to try on the pants she had selected. When Gregory emerged from the fitting room wearing the pants, she thinks she remembers Tracy had her "arms crossed" and "had her head kind of cocked to one side with this little snicker on her face." It appears that Tracy was inside the general fitting

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[5] The alleged discriminatory conduct at issue in the May 5, 2001, incident was not targeted at Gregory. Consequently, the Court will not consider the incident as a separate claim of race discrimination against Gregory.

room area. Tracy did not say anything to Gregory. Gregory also observed two officers "leaning on clothing racks" outside of the general fitting room area. Gregory does not know whether Tracy summoned the officers. After observing the pants in the mirror, Gregory returned to the fitting room to remove the pants. Gregory then went to the register to purchase the pants. Tracy began to ring up the sale when Gregory told her, "You know, I'm not buying these, but I do want to speak to your manager." Tracy called the manager and Gregory spoke to the manager. Gregory's sister then attempted to persuade Gregory to purchase the pants. Gregory refused to purchase the pants. Gregory and her sister then left the store without incident.

2. Security Tag Incident

Gregory had purchased a bedding set from a Burlington Coat Factory store. The employee at the Burlington Coat Factory store did not remove the security tag from the merchandise. A friend of Gregory's who worked at Dillard's told Gregory that she could remove the security tag if Gregory came by the store. On an unspecified date, Gregory went to the Dillard's store to have the security tag removed. The bedding set was in a plastic bag. Gregory also brought the Burlington Coat Factory store receipt. The Dillard's employee Gregory encountered, who was not the friend with which Gregory had spoken, checked the receipt and removed the security tag. When Gregory indicated that she wanted to walk

around the store with the bagged bedding set, the employee stepped in front of Gregory and said, "Well, why don't you just leave it here. I'll hold it for you." When Gregory stepped to the side to avoid the employee and walk past her, the employee moved to step back in front of Gregory. After Gregory protested, the employee gave Gregory the option of leaving the item with her or taking the item to Gregory's vehicle. Gregory left the item with the employee and walked around the store. Gregory then retrieved the bagged bedding set and left the store without incident.

There is no evidence that Gregory intended or attempted to purchase anything at the Dillard's store during this particular visit. After the Dillard's employee stepped in front of Gregory, Gregory told the employee that "she is going to look at this one thing and *then I'm going to leave*." (Emphasis added). After leaving the bag with the employee, Gregory testified that she was "really annoyed." She then testified, "I don't even think I made it all the way around – I don't know what I was going to go look for, but I know a [sic] took a few steps and I came back and I took my bag and I left."

3. April 7, 2001

In her complaint, Gregory alleges that she visited the Dillard's store on April 7, 2001, and was "followed" while at the store. In her deposition, Gregory testified that she has no recollection of any person that followed her. Gregory further testified that she

cannot remember how she was followed, what department she was in when she was followed, or where she was followed.

C. Jeff McKinney

McKinney's claims are based on one incident at the Dillard's store in Columbia, Missouri. The incident occurred in the summer of 2000.

McKinney and his two cousins went to the Dillard's store to shop for cologne. Upon arrival at the Dillard's store, McKinney and his cousins immediately went to the cologne counter. A sales associate was about 4 to 6 feet away when they arrived at the cologne counter. McKinney made eye contact with the sales associate about 5 seconds to a minute after he and his cousins arrived. The sales associate was not helping anyone when they arrived. McKinney and his cousins did not ask for help when they first arrived and the sales associate did not ask them if they needed any help. McKinney and his cousins then began using certain cologne testers that were located on the counter. A Caucasian customer arrived about three or four minutes later and was attended to by the sales associate. Another Caucasian customer was then attended to by the sales associate. It is undisputed that the customers went straight to the sales associate.

The sales associate eventually approached McKinney and his cousins about 15 minutes after they had arrived at the store. McKinney and his

cousins made no attempt during this 15 minute time span to ask the sales associate for help or to tell her that they wanted to purchase something. When the sales associate arrived, she immediately took the testers that had been used and placed them in their original location. The sales associate never asked McKinney and his cousins if they wanted to see or purchase the cologne they had tested. One of McKinney's cousins then asked the sales associate why they had been there for almost 15 minutes without being helped. In response, McKinney claims the sales associate was "rude in her tone of voice," but cannot remember exactly what she said. One of McKinney's cousins then asked to speak to the manager. At that point, McKinney and his cousins were talking to the sales associate in a "mad tone." McKinney then told his cousins that it was "not worth it," and they decided to leave the store. McKinney never asked the sales associate if he could purchase cologne at any point during the trip.

D. Michael Butler

Butler's claim is based on one incident at the Dillard's store in Columbia, Missouri. The incident occurred in the fall of 1999 or 2000.

Butler purchased some shoes from the Dillard's store. The morning after he purchased the shoes, Butler noticed that the shoes were scuffed. Butler then went to the Dillard's store to exchange the shoes.

After arriving at the Dillard's store, Butler spoke with a female sales associate and told her that he needed to exchange the shoes. The sales associate left and returned with a male sales associate. The female sales associate then asked Butler for his receipt. Butler forgot to bring the receipt. The female sales associate then stated, "Well, where did you buy those shoes?" Butler responded, "Ma'am, I bought them right here." The male sales associate then said, "Well, if you bought them right here, why don't you have your receipt," to which Butler responded he had left it at home. The female sales associate flipped open the box and the salesperson's name who sold Butler the shoes and "some kind of number" were written inside the box. The female associate said, "We don't know that you bought the shoes right here" and that Butler "could have stolen those shoes. People do that all the time and bring them in and try to get their money back." Butler told the female sales associate that he wanted to exchange the shoes for another pair. Both of the sales associates then stated they needed to get the manager. The female sales associate told Butler that he had to leave the shoes with her. Butler told the female sales associate that he paid cash for the shoes and was going to take them home. The female sales associate repeated that Butler needed "to leave the shoes."

Dillard's continued to dispute the exchange with Butler, keeping him at the store for an hour, and refusing to accept the exchange. Butler left the store with the shoes he had brought in to exchange. Butler

eventually returned to the store with the shoes and their receipt and exchanged the shoes for a new pair.

Dillard's current policy for returns/exchanges provides as follows:

> Dillard's will issue a refund in the form and amount of the original tender paid (including sales tax) or Dillard's will issue a Merchandise Credit, at the customer's choice, when each of the following conditions has been met: 1. The merchandise must be returned within thirty (30) calender [sic] days of purchase; and 2. The merchandise must be in its original, unused condition unless there is a manufacturer's defect; and 3. The merchandise must be accompanied by either the original Dillard's Receipt or the original Dillard's Proof of Purchase Label.

According to Don Edson, who is the store manager of the Dillard's store in Columbia, Missouri, the use of Proof of Purchase ("POP") labels as an alternative to a receipt for returns/exchanges did not begin at the Columbia, Missouri, store until March of 2000. A POP label is not handwritten and does not include the employee's identification number. It is a bar-coded yellow sticker. The POP label is scanned and put on the item when the purchase is made and can be removed or fall off the item. Prior to March of 2000, a customer in the Columbia, Missouri, store was required to present a receipt to return/exchange merchandise.

Rick Beasley was an employee of the Dillard's Store in Columbia, Missouri, from 1996 to 1999. In

his deposition, Beasley testified that Dillard's policy for returns/exchanges during the time period in which he worked required the customer to furnish a receipt to return/exchange the merchandise. When asked if he ever witnessed "somebody allowing a Caucasian to return something without a receipt," Beasley responded "Oh, yeah." Beasley testified that African American customers were denied returns/exchanges in the absence of a receipt.

Maren Snell was an employee of the Dillard's store in Columbia, Missouri, from July 2001 to December 2001. Thus, Snell was an employee at Dillard's after the POP policy had been initiated. In her deposition, Snell testified that she observed Dillard's employees instruct African-American customers to furnish a receipt for merchandise that contained a POP label during an attempted return/exchange. When asked if Snell ever witnessed a "white customer being asked for a receipt," Snell responded, "No."

E. Cecilia Young

Young's claim is based on one incident at the Dillard's store in Columbia, Missouri. The incident occurred in the summer of 2000.

Young had spent several hours shopping in the Dillard's store. She made an initial purchase in one of the departments in the amount of $200.00, for which she paid with a check. There was no problem processing the check. At the end of the day, when the

store had closed, Young attempted to make a second purchase with a check in the amount of $600.00. The sales associate assisting Young accepted the check, but when the check was "run through" the system, the check was declined. The sales associate did not know why the check was declined and was apologetic. The sales associate then called for a manager to see if the manager could override the system. Young does not know if the manager "refused to come or what happened. I know they did not come. I heard [the sales associate] asking or appearing to ask them to come for assistance and they did not come."

Young decided to leave the store. The sales associate set aside the merchandise Young selected so she could purchase it later. Upon leaving the store, Young was provided a toll free number she could call to inquire as to why her check was declined. Young called the number and spoke to an individual who advised her of a dollar limit that was in place at Dillard's. Young also learned that the check was declined by a company other than Dillard's. Young returned the next day and purchased the merchandise that had been set aside.

II. Standard

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving

party to establish the absence of a genuine issue of material fact. *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997). "Once the moving party shows that there are no material issues of fact in dispute, the burden shifts to the nonmoving party to set forth facts showing that there is a genuine issue for trial." *Donovan v. Harrah's Maryland Heights Corp.*, 289 F.3d 527, 529 (8th Cir. 2002). In deciding a motion for summary judgment, the Court must view all facts and inferences from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

III. Discussion

A. MHRA

Alberta and Carla Turner, Crystal Gregory, and Jeff McKinney assert, or arguably assert, claims pursuant to Section 213.065 of the MHRA. Mo. Rev. Stat. § 213.065. Section 213.065 of the MHRA prohibits discrimination on the basis of race in "any place of public accommodation." *Id.*; *see also Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 167 (Mo. Ct. App. 1999) ("[T]he general purpose of the act is to prevent *anyone* in the state of Missouri from being refused public accommodations because of discriminatory attitudes."). No Missouri court has determined whether a retail store such as Dillard's is a "place of public accommodation." Therefore, in analyzing this issue, the Court turns to

decisions addressing Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.,* which also prohibits discrimination on the basis of race in "any place of public accommodation." *Id.* § 2000a(a); *see also VanKempen v. McDonnell Douglas Corp.,* 923 F. Supp. 146, 149 (E.D. Mo. 1996) ("[D]ecisions under federal discrimination laws are authoritative under the MHRA as well as federal law, where the Missouri Supreme Court has not spoken on an issue."); *Red Dragon,* 991 S.W.2d at 168 ("When Missouri has not addressed an issue under the MHRA, Missouri courts may look to federal decisions interpreting similar civil rights laws.").

Both the MHRA and Title II define a "public accommodation" in part as:

> Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment[.]

42 U.S.C. § 2000a(b)(2); Mo. Rev. Stat. § 213.010(15)(b). "The clear implication of [the provisions] is that Congress [and the Missouri Legislature] did *not* intend to include retail establishments – thus the need to make clear that restaurant type facilities within a retail establishment were covered under 42 U.S.C. § 2000a(b)(2) [and Mo. Rev. Stat. § 213.010(15)(b)]. If retail establishments were also intended to be covered, there would be no need for [the provisions.]" *Priddy v. Shopko Corporation,* 918 F. Supp. 358, 359

(D. Utah 1995); *see also Gigliotti v. Wawa, Inc.*, 2000 WL 133755, at * 1 (E.D. Pa. Feb. 2, 2000) (retail stores are not places of public accommodation); *McCrea v. Saks, Inc.*, 2000 WL 1912726, at * 2 (E.D. Pa. Dec. 22, 2000) (same); *Chu v. Gormans, Inc.*, 2002 WL 802353, at * 4 n.3 (D. Neb. Apr. 12, 2002) (same). Summary judgment is granted in favor of Dillard's as to plaintiffs' MHRA claims.

B. Section 1981

All of the plaintiffs assert claims pursuant to 42 U.S.C. § 1981. The parties stipulate, and the Court agrees, that this case is governed by the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Hampton v. Dillard's, Inc.*, 247 F.3d 1091, 1107 (10th Cir. 2001); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 869 (6th Cir. 2001). Plaintiffs must first establish a prima facie case of discrimination. *McDonnell*, 411 U.S. at 802. To establish a prima facie case of discrimination under Section 1981, plaintiffs must show: (1) that they are members of a protected class; (2) that Dillard's intended to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity defined in § 1981. *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004); *Daniels v. Dillard's, Inc.*, 373 F.3d 885, 887 (8th Cir. 2004); *but see Christian*, 252 F.3d at 872 (adopting different prima facie test). Section 1981 provides that all persons must have the same right to 'make and enforce

contracts' and the right to 'the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Bediako,* 354 F.3d at 839 (quoting 42 U.S.C. § 1981(a)-(b)). Once plaintiffs establish a prima facie case, Dillard's must articulate some legitimate, non discriminatory reason for its actions. *McDonnell,* 411 U.S. at 802. If Dillard's satisfies its burden, plaintiffs must then present sufficient evidence to demonstrate that the proffered reason is a merely pretext for discrimination. *Id.* "The ultimate question of law is whether the evidence is sufficient to create a genuine issue of fact as to whether the defendant intentionally discriminated against the plaintiff." *Carter v. St. Louis University,* 167 F.3d 398, 401 (8th Cir. 1999).

1. The Turners & Crystal Gregory

Except for one claim asserted by Gregory, the remaining claims of the Turners and Gregory amount to discriminatory surveillance. "[D]iscriminatory surveillance . . . on its own [is] not actionable under § 1981." *Hampton v. Dillard's, Inc.,* 247 F.3d 1091, 1109 (10th Cir. 2001); *see also Garrett v. Tandy Corp.,* 295 F.3d 94, 101-102 (1st Cir. 2001). Allowing the Turners and Gregory to proceed on a theory of discriminatory surveillance "would come close to nullifying the contract requirement of Section 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts." *Lewis v. J.C. Penney Co.,* 948 F. Supp. 367, 371-72 (D. Del. 1996). The Eighth Circuit has made

clear that "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001). Summary judgment is granted in favor of Dillard's as to plaintiffs' claims of discriminatory surveillance in violation of § 1981.

The one claim asserted by Gregory that does not rely on a theory of discriminatory surveillance is the claim based upon the security tag incident. "[A] § 1981 claim for interference with the right to make and enforce a contract must involve the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Hampton*, 247 F.3d at 1104; *Youngblood*, 266 F.3d at 854-55 (requiring interference with "contractual relationship"). Gregory fails to demonstrate an interference with an actual contractual interest or relationship. There is no evidence that she intended to purchase merchandise at Dillard's during the day of the incident. Moreover, there is no evidence that Gregory attempted to purchase merchandise and was thwarted in her attempt to purchase merchandise. Summary judgment is granted in favor of Dillard's as to Gregory's final claim of discrimination in violation of § 1981.

2. Jeff McKinney

McKinney's claim must fail because there is no question of material fact as to the contractual element of his prima facie case. To proceed with a § 1981 claim, "there must have been interference with a

contract beyond the mere expectation of being treated without discrimination while shopping." *Hampton,* 247 F.3d at 1118. McKinney made no attempt to purchase cologne from the sales associate. He voluntarily left the store after being subjected to what he believed to be rude behavior. Because McKinney did not attempt and therefore was not denied an opportunity to enter into a contract, and because McKinney chose to leave the store of his own accord, Dillard's cannot be held liable under § 1981. *Bagley v. Ameritech Corp.,* 220 F.3d 518, 521-22 (7th Cir. 2000).

McKinney further argues that the 15 minute delay, in and of itself, is actionable under § 1981. "[M]ere delay, even coupled with discourteous treatment, poor service, or racial animus, is insufficient to sustain a § 1981 claim." *Bentley v. United Refining Co. of Pennsylvania,* 206 F. Supp. 2d 402, 406 (W.D.N.Y. 2002); *see also Robertson v. Burger King,* 848 F. Supp. 78, 81 (E.D. La. 1994). Summary judgment is granted in favor of Dillard's as to McKinney's § 1981 claim.

3. Cecilia Young

Young cannot establish a prima facie case of discrimination. She claims that *Dillard's* prevented her from making a purchase by not taking her check. She further claims the reason for said denial was racial discrimination. It is undisputed that the check at issue in this case was declined by a company *other than Dillard's*. Accordingly, Dillard's could not have intended to discriminate against Young on the basis

of her race or prevented her from making a purchase because Dillard's had nothing to do with the denial of the check. Summary judgment is granted in favor of Dillard's as to Young's § 1981 claim.

4. Michael Butler

In contrast to the other plaintiffs in this case, Butler can establish the contractual element of his § 1981 claim. Butler purchased shoes from Dillard's. The ability to return/exchange the shoes for another pair of shoes is a "benefit, privilege, term, and condition" of the contractual relationship between Butler and Dillard's. 42 U.S.C. § 1981(b). Butler was denied that aspect of the contractual relationship when he was initially denied the ability to return/exchange his shoes. The fact that he was later able to return/exchange the shoes is irrelevant given the evidence of discrimination that will soon be discussed. *See Hampton*, 247 F.3d at 1105-07.

The Court finds that there are material issues of fact in regard to the ultimate question of intentional discrimination that must be resolved by a jury. Dillard's posits that Butler was thwarted in his initial attempt to exchange the shoes because he did not have a receipt. Once he was able to furnish his receipt, Butler was able to exchange the shoes. Butler, in rebuttal, presents evidence from two former Dillard's employees who testified that African Americans were treated differently than Caucasians with regard to returns/exchanges at the Dillard's store. The

evidence presented by Butler is sufficient to allow his § 1981 claim to proceed to trial. *Id.* at 1107-10; *see also Youngblood,* 266 F.3d at 858-59 (Arnold, J., dissenting); *Scott v. Macy's East, Inc.,* 2002 WL 31439745, at *5-*6 (D. Mass. Oct. 31, 2002). Accordingly, summary judgment is denied as to Butler's § 1981 claim.

IV. Conclusion

Based on the foregoing, it is hereby

ORDERED that Dillard's Motion for Summary Judgment Against Plaintiffs Alberta and Carla Turner (Doc. # 68) is granted. Alberta and Carla Turner are dismissed from this lawsuit. It is further

ORDERED that Dillard's Motion for Summary Judgment Against Plaintiff Crystal Gregory (Doc. # 70) is granted. Crystal Gregory is dismissed from this lawsuit. It is further

ORDERED that Dillard's Motion to Strike Affidavit of Theresa Cain (Doc. # 88) is denied as moot. It is further

ORDERED that Dillard's Motion to Amend January 3, 2005, Order and to Dismiss Plaintiff Jeff McKinney or in the Alternative for Summary Judgment (Doc. # 161) is granted in part and denied in part. Dillard's Motion to Amend is denied. Dillard's Motion for Summary Judgment is granted. Jeff McKinney is dismissed from this lawsuit. It is further

ORDERED that Dillard's Motion for Summary Judgment on the Remaining Claims Asserted by Michael Butler, Deidra Golphin, and Cecilia Young (Doc. # 163) is granted in part and denied in part. Cecilia Young is dismissed from this lawsuit. Michael Butler's claim remains pending for trial.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States
District Judge

Dated: 7-22-05

(2)

No. 09-322

Supreme Court, U.S.
FILED
OCT 15 2009
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In The
Supreme Court of the United States

CRYSTAL GREGORY; ALBERTA TURNER; CARLA TURNER; TREVA GAGE; DEBRA HAMILTON; CAPRIA LEE; JEFF McKINNEY; ARNEL MONROE; MICHAEL RICHMOND; MAREN SNELL; FELICIA TURNER; MICHAEL WARRICK; and LASHANDA WISHAM,

Petitioners,

v.

DILLARD'S, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the dismissal under Rule 12(b)(6) of the claims of petitioners Gage, Hamilton, Lee, Monroe, Richmond, Snell, Felicia Turner, Warrick, and Wisham for failure adequately to plead a claim for relief under 42 U.S.C. §1981.

2. Whether as to petitioners Gregory, Alberta and Carla Turner, and McKinney, the Court of Appeals correctly held that §1981 does not provide a cause of action for allegedly discriminatory surveillance where, as here, petitioners were watched while they shopped but were not confronted, detained, searched, accused, arrested, or asked to leave respondent's store, and were never denied the right to buy any merchandise they desired to buy.

CORPORATE DISCLOSURE STATEMENT

Respondent Dillard's, Inc., is a publicly-held corporation listed on the New York Stock Exchange. It has no parent corporation, and no publicly-held corporation owns ten percent or more of its stock.

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REASONS FOR DENYING THE PETITION

Petitioners' request for review by this Court is largely an abstract polemic on some of the perceived evils in society that is divorced from the actual facts of this case. And their description of various cases ignores or blurs the factual differences in those cases in an effort to demonstrate an alleged "confusion among circuits." Petitioners seem oblivious to the fact that, as to nine of them, the Court of Appeals held that they had not adequately *pleaded* a §1981 case. They make no attempt to challenge the Eighth Circuit's application of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), or its resulting holding that those nine petitioners did not properly *plead* the requisite elements of a §1981 claim (Pet. Apdx 16-19). As to those petitioners, therefore, the Petition does not even purport to seek review of the basis for the lower court's judgment against them. As to the remaining four petitioners, the Petition misstates the conduct of respondent's employees, which was nothing more than silent surveillance and which never "interfered" with or "thwarted" any attempt by any petitioner to buy any merchandise of his or her choosing.

We will discuss the two sets of petitioners separately.

I. The Court of Appeals Correctly Applied *Twombly* in Holding That Nine of the Petitioners Had Not Adequately Stated a Claim Under §1981, and the Petition Does Not Address That Ruling.

The claims of petitioners Gage, Hamilton, Lee, Monroe, Richmond, Snell, Felicia Turner, Warrick, and Wisham (the "Rule 12 petitioners") were dismissed by the district court under Rule 12(b)(6) for failure to state a claim upon which relief could be granted (Pet. Apdx 142-45). The Petition does not mention Rule 8, Rule 12, or *Twombly*, and does not attempt to establish the sufficiency of the allegations of the complaint by the Rule 12 petitioners. The "Question Presented" is simply *not* presented as to them.

In their Third Amended Complaint, the Rule 12 petitioners alleged collectively that "each experienced . . . instances at Dillard's Columbia store in which they were followed and/or otherwise subjected to surveillance based upon their race." (8th Cir. Apdx 58). Each of the petitioners then set forth his or her claim in a separately-numbered count. Counts I-III involved petitioners Crystal Gregory, Alberta Turner, and Carla Turner (as to whom summary judgment was eventually granted and affirmed). Count IV purported to assert claims by those three petitioners on behalf of a class.[1] Counts VI (Gage), VIII (Hamilton),

[1] Class certification was denied by the district court, and that determination was not appealed.

IX (Lee), XII (Monroe), XIII (Richmond), XIV (Snell), XV (Felicia Turner), XVI (Warrick) and XVII (Wisham) each contained the following identical, conclusory boilerplate language without any factual detail.[2]

> "Plaintiff sought to make and enforce a contract for services ordinarily provided by Dillard's, Inc.
>
> "Plaintiff was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that:
>
> "a. Plaintiff was deprived of services while similarly situated persons outside the protected class were not; and/or
>
> "b. Plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory." (*Id.* at 61, 65, 67, 73, 75, 77, 79, 81, 83).

The remaining verbatim allegations of each count summarily asserted that Dillard's engaged in unlawful discriminatory practices, conducts intentionally racially discriminatory surveillance, and has exhibited a pattern and practice of discrimination

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[2] The omitted intervening counts related to original plaintiffs who are no longer parties and to Jeff McKinney (Count XI), whose claim was dismissed on summary judgment.

against African-American citizens. No details of any supposedly discriminatory acts *vis-à-vis* any particular petitioner were set forth in any of these counts.[3]

After the district court's dismissal order, this Court tightened the pleading requirements under Fed. R. Civ. P. 8 to reinforce the prohibition of the conclusory type of pleading that is featured in this case. In *Twombly*, 127 S. Ct. at 1964-65, the Court said:

> "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286 . . . (1986) (on a motion to dismiss courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'). Factual allegations must be enough to raise a right to relief above the speculative level. . . ."

Twombly expressed disapproval of "bare" or "naked" assertions, *id.* at 1966, and quoted with approval 5 *Wright & Miller, Federal Practice and Procedure*

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[3] The Rule 12 petitioners were deposed prior to the district court's dismissal of their actions, but they did not request the court to convert the motion to dismiss into one for summary judgment. Moreover, their testimony confirmed that they were complaining about nothing but surveillance and that they all were able to buy any merchandise they wished from Dillard's. (8th Cir. Supp. Apdx 356-57, 380, 411, 438, 492, 506, 512, 537, 552-53).

§1202 at 94, 95 (3d ed. 2004) to the effect that "Rule 8(a) 'contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented'. . . ." *Id.* at 1965 n.3. The Court reaffirmed that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 1967, quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). In the specific context of §1981, the Court has applied these principles to require that "[a]ny claim brought under §1981, therefore, must initially identify an impaired 'contractual relationship,' §1981(b), under which the plaintiff has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).

Just last Term in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), the Court emphasized that the *Twombly* requirements apply to all federal complaints pursuant to Rule 8, which "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Citing *Twombly*, the Court reiterated the precepts that rightly disposed of the Rule 12 petitioners' claims below:

> "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' will not do. . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.*

In contrast to petitioners Gregory and Alberta and Carla Turner, who at least put some factual meat

on the bones of their complaint by reciting the details of a particular shopping experience, the nine Rule 12 petitioners merely uttered the very kind of formulaic legal conclusions deemed inadequate in *Twombly* and *Iqbal*. And, as emphasized by the Court of Appeals, they did not even properly invoke the provisions of §1981 because they did not identify an impaired contractual relationship or plead that there was the kind of interference with a protected activity that falls within the statute.

The disposition of the Rule 12 petitioners' claims was simply based on inadequate pleading and did not implicate any of the issues discussed in the Petition or encompassed by the Question Presented. This Court has twice in the last three Terms addressed the pleading requirements of Rule 8. The disposition below is in conformity with those rulings and presents nothing worthy of further review by this Court.

II. The Court of Appeals Correctly Affirmed the Summary Judgment Against the Remaining Four Petitioners, Who Complained That They Did Not Like Being Watched While Shopping; The Circuits Are Uniform in Holding That Discriminatory Surveillance Is Not Actionable Under §1981.

The record evidence concerning the claims of petitioners Crystal Gregory, Alberta Turner, Carla Turner, and Jeff McKinney is accurately set forth by

the Eighth Circuit majority at pages 20-23 of the Appendix to the Petition. The essence of Gregory's complaint was that two security officers were looking at her when she emerged from a fitting room and that the sales clerk had a "smirk" on her face. Because she was offended by this conduct, she made a voluntary decision not to buy anything.

The Turners were upset by a similar experience, where they were watched and followed by a security guard. Like Gregory, they expressed their displeasure by telling the sales clerk that they would not make a purchase and that "you just made someone lose a sale." As for petitioner McKinney, he merely sampled the cologne testers without ever indicating to anyone that he had any interest in buying anything. His claim was so barren that even the panel majority originally affirmed its dismissal (Pet. Apdx 106), though those two judges changed their mind when dissenting from the en banc opinion (*id.* at 55-56).

These distinctive facts, even when viewed most favorably to petitioners, establish unequivocally that this case involves nothing more than surveillance, despite petitioners' rhetoric about "racial harassment," "interference," "humiliation," and "obstruction." In contrast to some of the cases and monographs cited by petitioners, there is no evidence that *any* of these petitioners was stopped, detained, confronted, questioned, searched, accused of shoplifting, arrested, denied admittance, or asked to leave the store. In fact, no petitioner even asserted or testified that Dillard's security personnel *ever spoke a single word*

to him or her. This case involves nothing more than petitioners being watched.[4]

Admittedly some of the petitioners were offended by the surveillance and some decided to shop elsewhere as a result, but such a scenario doesn't come close to falling within the limited reach of §1981. The fallacy in petitioners' legal theory is that §1981 is an all-pervasive anti-discrimination statute that affords them a remedy for all perceived racial slights, including, in this case, hurt feelings. But the various Circuits have correctly recognized that this statute – aimed primarily at employment discrimination – does not provide a cause of action for a denial of the "expectation of being treated without discrimination while shopping." *Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001), *cert. denied*, 534 U.S. 1131 (2002). *See also Kinnon v. Arcoub, Gopman & Assocs., Inc.*, 490 F.3d 886, 892 (11th Cir. 2007) ("Section 1981 does not provide a general cause of action for all racial harassment that occurs during the contracting process."); *Clegg v. Ark. Dep't of Correction*, 496 F.3d 922, 929 (8th Cir. 2007) (federal civil rights statutes do not "set forth a general civility code" or concern themselves with

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[4] Indeed, the Eighth Circuit granted en banc rehearing because the panel majority had grounded its reversal of the district court's dismissal on the basis of "weird grins," "staring," and "smirking expressions" by Dillard's security personnel (Pet. Apdx 84, 85, 86, 104).

"petty slights, minor annoyances, and simple lack of good manners").

This Court's latest §1981 decision has effectively rejected petitioners' cause. In *Domino's Pizza*, 546 U.S. at 476, 479, the Court noted that §1981 "has a specific function" limited to making and enforcing contracts and that it "offers relief when racial discrimination blocks the creation of a contractual relationship as well as when racial discrimination impairs an existing contractual relationship," but that it is not "meant to provide an omnibus remedy for *all* racial injustice." The Court in *Domino's Pizza* further observed that an expansive reading of §1981, such as that proposed here by petitioners, would not only defy the statutory language and congressional intent "but would produce satellite §1981 litigation of immense scope." *Id.* at 479.

This concern about runaway litigation is vividly illustrated here, where petitioners seek to recover actual and punitive damages for perceived or imagined slights and indignities even though not a single petitioner was denied the right to purchase any merchandise of his or her choosing. Section 1981 is a particularly attractive vehicle for such opportunism because there is no requirement for administrative exhaustion, and the damage caps imposed by §1981a(b)(3) on compensatory and punitive damages under most civil rights statutes do not apply to claims asserted under §1981. *See* §1981a(b)(4). Moreover, lawsuits under that statute typically abound with claims of emotional distress, lost appetites, sleepless

nights, etc. – which are essentially unverifiable and virtually irrefutable. Yet petitioners' interpretation of the statute would subject every retail establishment to the burden of extensive discovery and a jury trial on the complaint of any customer who alleges a supposed racial indignity and asserts that his subjective reaction caused him such angst that he did not want to do business with the offender's employer – even if he never intended to buy anything in the first place.

The conduct deemed actionable by petitioners pales by comparison to actions held by other courts *not* to give rise to a §1981 claim. In *Bagley v. Ameritech Corp.*, 220 F.3d 518, 519-20 (7th Cir. 2000), for example, the plaintiff had previously heard one of the defendant's employees say, "I hate f***ing Mexicans," and when he went to the defendant's store to buy a telephone, she gave him "the finger" and said, "I will not serve him." *Id.* at 520. The plaintiff was offended and left the store, then sued under §1981. The Seventh Circuit affirmed the dismissal of his case, holding that "[s]ince Ameritech was not responsible for terminating the transaction, it did not violate §§1981 and 1982." *Id.* at 522.

In *Arguello v. Conoco, Inc.*, 330 F.3d 355, 356 (5th Cir.), *cert. denied*, 540 U.S. 1035 (2003), the plaintiff Arguello had completed her purchase of gas and was in the process of buying beer when the employee serving her and her father "made several racially derisive remarks." The employee actually "began screaming racist remarks over the intercom." *Id.* at 357. The district court opinion noted that the "racial

obscenities" included calling Arguello "a f***ing Iranian Mexican bitch." *See* 2001 WL 1442340 (N.D. Tex. 2001) at *1. Her father, Alberto Govea, overheard the remarks and became so irritated with the treatment of his daughter that he "left the beer he had intended to purchase on the counter and walked out of the store." 330 F.3d at 357.

The Fifth Circuit concluded that neither Arguello nor Govea had a claim under §1981. The court held that the plaintiff "'must offer evidence of some tangible attempt to contract' that in some way was 'thwarted' by the defendant." *Id.* at 358, quoting *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 752 (5th Cir. 2001). The *Arguello* court observed that "[e]gregious as [the clerk's] conduct may have been, it neither prevented the formation of a contract nor altered the substantive terms on which the contract was made." 330 F.3d at 361. Govea's case was dismissed because "[a]lthough his decision to abandon his purchase resulted from [the clerk's] mistreatment of his daughter, [the clerk] did not actually interfere with an attempted purchase." *Id.* at 359.

More recently, in *Kinnon*, 490 F.3d at 889, the court upheld the dismissal of a §1981 claim by a black customer whose pizza delivery order was delayed so long that she left the delivery site and went to a restaurant to eat. When the delivery person returned to the pizzeria with the undelivered pizzas, the store manager called the plaintiff's office and left a threatening voice-mail message in which she called the plaintiff, among other things, a "piece of shit

nigger. Nigger bitch." *Id.* Relying on *Arguello*, the Eleventh Circuit ruled that the plaintiff had no §1981 claim because she had terminated the pizza contract unilaterally and the offensive conduct did not impair her ability to contract.[5]

The law around the country is thus uniform in its insistence that §1981 be limited to the purpose for which it was originally enacted in 1866 – to protect racial minorities from being shut out of a market by purposeful acts based on race. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 428 (1968) (noting that the 1866 Act was passed to counteract "laws virtually prohibiting Negroes from owning or renting property"). Dillard's is in the business of selling merchandise, and it is counter-intuitive to suggest that it would be unwilling to deal with a good-faith purchaser. Nothing in the record of this case suggests that it refused to sell any merchandise that any plaintiff wanted to buy, and plaintiffs' professions of embarrassment or umbrage do not get them past the courthouse door. The en banc Court of Appeals got it right, and there is no conflict among the Circuits on

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[5] In the cases cited by petitioners in which §1981 claims were deemed viable, the plaintiff was asked to leave the store (*Christian*, Pet. 14-15), was completely shunned and ignored when inquiring about the availability of facilities (*Keck*, Pet. 15), or was the victim of a state-sanctioned invasion of privacy (*Hall*, Pet. 15-16).

the issue actually presented by this case – discriminatory surveillance.[6]

III. Retailers Have a Right To Surveil Customers and Would-Be Customers, and To Monitor Their Movements, in Order To Prevent Shoplifting, Vandalism, Loitering, and Violence.

In rejecting petitioners' contention that §1981 affords a cause of action for any would-be shopper who feels offended by surveillance, the Court of Appeals took note of the prevalence of shoplifting in the retail sector (Pet. Apdx 26-27). Indeed, a department store has literally millions of dollars of merchandise on display adjacent to pedestrian aisles traversed by hundreds, even thousands, of persons each day. The doors are open to all – whether buyers, browsers, lookers, mall-walkers, or potential miscreants with nothing better to do. Being located in a shopping mall, as most Dillard's stores are, entails

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[6] Petitioners' assertion that there is an intra-circuit split within the Eighth Circuit (Pet. 18-20) is both wrong and irrelevant. To the extent that Judge Murphy's opinion in *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007), is inconsistent with the decision below, the en banc ruling obviously prevails and overrides any such inconsistent aspects of *Green*. Moreover, this Court does not ordinarily concern itself with disagreements among judges on the same court. *Davis v. United States*, 417 U.S. 333, 340 (1974). Dillard's sought review by this Court in *Green* because it was out-of-step with other §1981 cases, a situation now remedied by the en banc decision below.

additional concerns, as such malls have increasingly become magnets for teenagers and others looking for a place to "hang out."[7]

In a book entitled *Shoplifters vs. Retailers, The Rights of Both* (New Century Press, 2000), p. 94, the author points out that a "whopping $16 billion" in goods is shoplifted from retailers each year. Because police departments "couldn't possibly provide the necessary manpower required to deal with shoplifting . . . merchants must hire their own protective force and deal with the inherent risks always connected with detection and apprehension. . . ." *Id.* The author further notes that the costs associated with shoplifting, in addition to the value of the stolen merchandise, include "payroll for store security agents, television cameras, electronic detection equipment, astute surveillance systems, mirrors, radios, insurance premiums, and workmen's compensation injury claims." *Id.*[8]

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[7] A number of shopping malls have recently barred unaccompanied minors from their premises at night because of bad experiences involving hassling of customers, shoplifting, and even brawls. *See* "Galleria Mall Bars 160 Teens Under New Rule," ST. LOUIS POST-DISPATCH, Apr. 21, 2007, p. A-11.

[8] Security officials are also constantly plagued by safety concerns as, alarmingly, malls have recently been the scene of mass murders. In 2007, a deranged teenager killed nine people (including himself) and wounded at least five others in an Omaha department store. *See* "Omaha's Deadliest Hour: Worst Single-Day Killing Spree in Nebraska History," OMAHA WORLD HERALD, Dec. 6, 2007, p. 1. And early last year, five people were shot and killed in a Chicago-area mall. *See* "Five Women Slain in Store," CHICAGO TRIBUNE, Feb. 3, 2008, p. 1.

The "inherent risks" of protecting one's property should not include liability under §1981 if surveillance impacts one group more than another. In recognition of these legitimate security concerns, and in light of the limited reach of §1981, no appellate court has ruled that discriminatory surveillance violates §1981. *See Garrett v. Tandy Corp.*, 295 F.3d 94, 98-103 (1st Cir. 2002) (customer who was subjected to surveillance, watched carefully, branded a potential thief, and reported to police had no §1981 claim because he had completed the purchase of merchandise); *Morris v. Office Max, Inc.*, 89 F.3d 411, 412-14 (7th Cir. 1996) (where police were called because shoppers were "acting suspiciously," no §1981 claim even though encounter with police "caused them to 'los[e] interest'" in making a purchase because "[t]hey were denied neither admittance nor service, nor were they asked to leave the store"); *Morris v. Dillard*, 277 F.3d at 752-53 (customer who was detained for shoplifting but left store of her own accord without attempting to make any purchase did not state a claim under §1981); *Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d at 1108, 1118 ("discriminatory surveillance" is "on its own not actionable under §1981," which does not "protect[ ] customers from harassment upon entering a retail establishment").[9]

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[9] Petitioners' selective description of *Hampton* (Pet. 14) neglects to note that liability was imposed there because the plaintiff was not permitted to redeem her coupon and obtain the

(Continued on following page)

The First Circuit in *Garrett* perhaps said it best:

> "In a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movements. So long as watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases, it is not actionable under section 1981." 295 F.3d at 101.

Therefore, even if we assume, *arguendo*, that Dillard's paid closer attention to African-American customers than to others, petitioners' case – based as it is on discriminatory surveillance – is not sustainable under §1981, and, as noted, there is no division among the Circuits on that issue.

* * *

Petitioners' characterization of this case as involving "racial harassment," and "interference" with the making of contracts is self-serving hyperbole not supported by the record. Nor is there any basis for claiming that the Eighth Circuit majority described Dillard's actions in those terms. Rather, the Court said that the evidence presented "shows at most discriminatory surveillance and watchfulness, which is not actionable interference under §1981" (Pet. Apdx 23). Petitioners' proposed expansion of §1981 to such garden-variety surveillance activities, based on the

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merchandise to which it pertained and therefore "suffered an actual loss of a privilege of her contract." 247 F.3d at 1106.

subjective sensibilities of those being watched, would blur the bright line drawn by the statute, would create an unmanageably slippery slope, and "would produce satellite §1981 litigation of immense scope" that the Court unanimously cautioned against in *Domino's Pizza*.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

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Petitioners,

v.

DILLARD'S, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The issue before this Court is narrow yet important: the level of race-based treatment permissible in a retail setting under 42 U.S.C. § 1981. Pet. at i. More precisely, must race-based treatment actually prevent customers from completing their transactions? The circuit courts of appeals apply varying standards for determining liability, ranging from actual prevention to less significant interference. *See* Pet. at 10. This Court should grant certiorari to resolve the split in the circuits and to clarify the proper standard. Defining Section 1981's reach in the retail context is important to shoppers and retailers, and resolving this issue would benefit both. *Id.* at 21-27; Br. Opp. at 13; *see also* Petition for Writ of Certiorari, *Dillard's, Inc. v. Green*, 2007 WL 2436689, at *24 (U.S. Aug. 23, 2007) (No. 07-260).

Dillard's addresses neither the division among the courts of appeals regarding the requisite standard for Section 1981 in the retail context, nor whether actual prevention of the formation of the retail contract is required. Rather than admit the existence of an obvious circuit split, Dillard's attempts to misdirect this Court's attention to race-based surveillance, an issue that is necessarily subsumed within the larger questions concerning race-based treatment and contract prevention. Dillard's further tries to confuse the issue by making arguments that are directed to the merits, instead of providing any credible reason for denying certiorari.

Section 1981 safeguards the rights of people to purchase merchandise free from race-based discrimination. Currently, these rights vary depending on the location of the store because there is no clear standard defining liability under Section 1981 in the retail context.

I. Because Of The Split In The Circuits, Whether A Plaintiff Pleads A Section 1981 Claim Under *Twombly* And *Iqbal* Can Be Determined Only After The Court Articulates The Appropriate Standard

Dillard's principally relies on the Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2006), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which provide no basis for denying certiorari on the issue presented here. This Court is being asked to decide what a plaintiff must plead and prove under Section 1981 in the retail context. To require a plaintiff to satisfy these standards without knowing what the claim demands is to require prescience among Section 1981 plaintiffs regarding the sufficiency of their pleadings.

The Court was able to evaluate the sufficiency of the pleadings in *Iqbal* and *Twombly* because the legal standards for the underlying claims were well-settled. *Iqbal* involved a *Bivens* suit,[1] the standard for

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1978).

which was "clear." *Iqbal,* 129 S. Ct. at 1948. The Court laid out those requirements in a methodical and specific manner in several previous decisions. *Id.* at 1948-49. As with *Iqbal*, the Court in *Twombly* discussed another well-settled legal standard: Section I of the Sherman Antitrust Act. *Twombly*, 550 U.S. at 555. *Iqbal* and *Twombly* are distinguishable from this case, where inter-circuit confusion exists regarding the essential elements of a Section 1981 claim. *See* Pet. at 9-18.

In some circuits, mere interference with an attempt to purchase merchandise is sufficient to trigger a Section 1981 claim. *See, e.g., Hall v. Pa. State Police*, 570 F.2d 86, 92 (3d Cir. 1986). In other circuits, actual prevention is required to state a Section 1981 claim in the retail context. *See, e.g., Arguello v. Conoco, Inc.*, 330 F.3d 355, 358-59 (5th Cir. 2003); *Kinnon v. Arcoub, Gopman & Assoc.*, 490 F.3d 886, 892 (11th Cir. 2007); *Bagley v. Ameritech Corp.*, 220 F.3d 518, 521 (7th Cir. 2000). Yet other circuits have different standards.[2] *See, e.g., Hampton v. Dillard's Dep't Stores, Inc.*, 247 F.3d 1091, 1106 (10th Cir. 2001); *Christian v. Wal-Mart Stores*, 252 F.3d 862, 872 (6th Cir. 2001). In *Iqbal* and *Twombly*, the substantive law was settled, which can be contrasted with Petitioners' case, where no single standard currently exists. In Petitioners' case, the

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[2] For an extended discussion of these cases, *see* Pet. at 12-14.

area of law is uncertain, and therefore, this Court must resolve the underlying legal standard before rendering a judgment on the sufficiency of the pleadings.

Dillard's discussion of *Twombly* and *Iqbal* is nothing more than a distraction. Dillard's insists that the question presented does not apply to Petitioners, whose claims the district court dismissed under Rule 12(b)(6). This assertion avoids the very issue the Petition addresses, that is, the applicable standard for Section 1981 in the retail context.

While the factual allegations in Petitioners' complaints go well beyond those contained in the excerpt Dillard's provides, *see* Br. Opp. at 2-3, this demonstrates why this Court should grant review. Using an actual prevention standard, the Eighth Circuit found the pleading insufficient. However, Petitioners' pleadings are deficient only if one assumes the actual prevention standard. The pleadings would be sufficient, even under *Iqbal* and *Twombly*, if the standard were "marked hostility" as in the Sixth Circuit, or "race based treatment" as in the Third Circuit. *See* Pet. at 14-16. It is this type of inconsistency across the courts of appeals that Petitioners are asking this Court to examine.

II. Dillard's Seeks To Evade The Clear Circuit Split By Improperly Focusing On Only Race-Based Surveillance

Dillard's does not respond to the arguments presented in the Petition for Certiorari and ignores the circuit split on the correct standard for pleading and proving Section 1981 claims in a retail setting.[3] Br. Opp. at 8.

Ignoring the fact that other circuit courts have come to different conclusions, Dillard's assumes that Section 1981 could only require application of the actual prevention standard adopted by the Eighth Circuit.[4] *E.g.*, Br. Opp. at 7-8. The importance of uniformly applying Section 1981 mandates that the rift between circuits be resolved.

Petitioners alleged that Dillard's discriminated on the basis of race in the making and enforcing of contracts, which included much more than race-based surveillance. *See* Pet. at 6-7. The heart of the issue presented is what level of race-based treatment –

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[3] Indeed, Dillard's attempt to classify Petitioners' case as a race-based surveillance case – for which Dillard's claims there is no circuit split – is vexing. In its petition for certiorari in *Dillard's, Inc. v. Green*, Dillard's expressly used race-based surveillance cases to illustrate the broader circuit split on discriminatory treatment under Section 1981. Petition for Writ of Certiorari, *Green*, 2007 WL 2436689, at *18.

[4] For a more detailed discussion of the actual prevention standard applied by the Eighth Circuit, *see* Pet. at 11-12.

whether it takes the form of harassment, surveillance, or some other treatment – is needed to establish a Section 1981 claim. Without clarification from this Court, the rights of consumers will continue to vary. As Dillard's acknowledges, the purpose of Section 1981 is "to protect racial minorities from being shut out of a market by purposeful acts based on race." Br. Opp. at 12. In light of Petitioners' evidence that the race-based conduct of Dillard's was intentional and systematic, Petitioners are asking this Court to clarify whether such purposeful acts qualify as racial discrimination that shut minorities out of the marketplace, and whether such purposeful acts can lead to contract prevention without actual refusal to complete a transaction.

Dillard's argues that Petitioners' claims do not fall within the reach of Section 1981. Br. Opp. at 8. This argument is directed at the merits of Petitioners' underlying claims, rather than to the splintered legal standard that Petitioners have asked this Court to clarify.[5] *Id.* Interestingly, Dillard's asked the Court to

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[5] Dillard's not only ignores the confusion about the legal standard at issue, but also mischaracterizes and trivializes Petitioners' claims to be less than what is averred in the complaints. *See generally* Part I, *supra*. Petitioners' case is about more than race-based surveillance, "perceived racial slights," or "hurt feelings," Br. Opp. at 8; it is about Dillard's interference with Petitioners' ability to form contracts, which Congress intended to protect under Section 1981.

resolve this same division among circuits in its petition for certiorari in *Green*. *See* Petition for Writ of Certiorari, *Green*, 2007 WL 2436689, at *18.

Dillard's also contends that the Court's decision in *Domino's Pizza, Inc. v. McDonald's* somehow weighs against granting certiorari in this case. 546 U.S. 470 (2006). In *Domino's Pizza*, the Court held that plaintiffs "must identify injuries flowing from a racially motivated breach of *their own* contractual relationship."[6] *Id.* at 480 (emphasis added). This is not an issue here, since each individual Petitioner has alleged a breach of his or her *own* ability to contract with Dillard's. *See* Pet. at 3-6.

III. Dillard's Hyperbole Regarding "Runaway Litigation" And Speculation About Increased "Shoplifting, Vandalism, Loitering, and Violence" Should Be Disregarded[7]

The bulk of Dillard's Brief in Opposition contains arguments concerning the standard that this Court should ultimately adopt; it does not address whether this Court should take this case to resolve an obvious

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[6] In *Domino's Pizza*, the plaintiff, an individual, alleged a breach of contract on behalf of the corporation in which he was the sole shareholder and contracting officer. The Court noted that under basic agency law, such an "officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza*, 546 U.S. at 477.

[7] Br. Opp. at 8, 13.

and growing circuit split on an issue of significant public importance. For example, Dillard's argues that a broad reading of the statutory language of Section 1981 would "defy the statutory language and congressional intent" as well as result in runaway litigation from opportunists seeking damages for "perceived or imagined slights and indignities." Br. Opp. at 9. This argument is not relevant to whether this Court should accept this case to articulate an appropriate standard.

Similarly, Dillard's argues that retailers have a right to monitor customers in order to prevent shoplifting and violence. Petitioners do not question retailers' rights to protect property, staff, and customers. However, the question is not about whether a store conducting surveillance can monitor one race more closely than another. The issue in this case is what level of race-based treatment is tolerated under Section 1981 when the purported justification is surveillance but the intended effect is to harass, intimidate, and dissuade African-American customers from patronage.[8]

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[8] The *Gregory* dissent notes that there is nothing in Section 1981's legislative history, nor in the case law, that suggests that the statute tolerates a certain level of intentional discrimination. Pet. App. at 67-68. But that is the issue the Petitioners are asking this Court to resolve.

Dillard's also refers to unaccompanied minors involved in disruptive behavior in retail establishments and to two tragic incidents involving armed gunmen who opened fire in retail settings. Br. Opp. at 14 & nn.7-8. These examples of extreme situations requiring surveillance are irrelevant and attempt to divert this Court's attention from the question presented by Petitioners. Equally important, there is absolutely no evidence that Dillard's race-based surveillance policy had anything to do with preventing violence in the store. *See* Pet. at 6 (noting that a "code 44" was announced whenever an African-American entered the store).[9]

This Court has the opportunity to resolve the growing split in the circuits on this important issue and to make it easier for merchants and businesses to implement lawful policies. Petitioners respectfully

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[9] Dillard's citation of these sad and tragic events in one sense highlights the issues surrounding the type of race-based surveillance that Dillard's employed in its Columbia, Missouri store. At least one of the examples that Dillard's provides involved a white teenager in Nebraska opening fire in a department store. Br. Opp. at 14 n.8.

request that this Court grant their Petition for Writ of Certiorari.

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